



Ninth Circuit  
Education Programs on  
Court Sponsored ADR

*Model Programs and  
Guide to Resources*

# **Education Programs On Court-Sponsored ADR**

## ***Model Programs and Guide to Resources***

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*under the oversight of*

**The Ninth Circuit ADR Committee**

*under the auspices of*

**The Western Justice Center Foundation**

*with support from*

**The JAMS Foundation**



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***Education Programs on Court-Sponsored ADR  
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## ***Introduction***

As Congress recognized seven years ago when it passed legislation requiring every federal district court to adopt an ADR Program, ADR has come of age.

The vast majority of lawyers and clients who have participated in an ADR program sponsored by a federal court have emerged grateful for the experience. They recognize that ADR provided them with an opportunity to work toward settlement, or toward streamlining and rationalizing their litigation, that was far more engaging and rewarding (in many different ways) than their unassisted efforts would have been. And even when their cases did not settle during the ADR event, they feel that they learned from and profited by the experience. As important, they praise the fairness of the procedures -- and know that, by providing them, the court really tried to help them find a better way. It is difficult to over-estimate the value of programs that leave litigants and lawyers with these kinds of feelings about our courts.

While it is clear that court-sponsored ADR has come of age, it is equally clear that innovation and evolution continue to be the hallmarks of ADR processes. Because of that innovation and evolution, a district court cannot meet its obligations under the ADR Act and cannot meet the ADR needs of its litigants and lawyers without periodically re-examining its ADR program to determine whether changes should be made (in light of new developments in the field or changes in the court's circumstances) in order to maximize the benefits the program could deliver.

A primary purpose of this Resource Guide is to make such re-examinations easier -- and to reduce the risk that when a court undertakes a review of some aspect of its program it will overlook significant issues that have surfaced in other jurisdictions. The heart of this Guide consists of a series of modules for planning and executing programs at annual District Court conferences. These conferences offer unique opportunities for lawyers and judges to share their views about the health and utility of current programs and procedures, to identify issues that warrant further analysis, and to begin formulating any appropriate changes in policy. The modules in this Guide are designed to help districts maximize the potential of these conferences -- to explore and debate the pertinent policy questions and practical suggestions as usefully as possible.

Toward these ends, the modules are, essentially, a series of self-contained lesson plans for sessions at annual district conferences. Each module is organized around a major subject or issue in the world of court-ADR. Each module suggests a structure for a program, identifies the critical issues that should be addressed, lists people with relevant expertise who might help amplify or tailor a program to a specific district's circumstances or who might serve as program faculty, and cites sources of written material that could be

consulted in preparation for the program or shared with participants. Thus, the modules make it much easier to go from program concept to completion in any one of these subject areas.

Dana Curtis, Esq., who has been a professional mediator for many years and who teaches mediation courses at Stanford Law School's Martin Daniel Gould Center for Conflict Resolution Programs, deserves the lion's share of the work, ably assisted by Robin Donoghue of the Circuit Executive's Office. The judges, lawyers, and litigants in this Circuit are deeply in her debt. On behalf of all this Guide's future beneficiaries, the Circuit's Standing Committee on ADR takes this opportunity to express its sincere gratitude to Ms. Curtis.

The Resource Guide is intended to be a living document. The ADR Committee intends to update it periodically to add modules that respond to the districts' needs and suggestions and to update the existing modules. For the Guide to remain useful, however, we need your feedback, both on the modules themselves and on the ADR programs that you present at district and other conferences. We welcome your substantive suggestions by accessing the ADR website. In addition, the ADR Committee is eager to help any district or bar group design or implement any ADR educational or training program. Please contact us through the website with any questions, suggestions, or requests for assistance.

We wish you all the best as you engage in the rewarding and constructive work of delivering ADR services.

Dorothy W. Nelson  
For the Ninth Circuit ADR Committee

## ***Contributions to the Program Guide***

### **The Ninth Circuit ADR Committee**

The following members of the Ninth Circuit ADR Committee initiated and supervised this project:

Senior Circuit Judge Dorothy W. Nelson, Chair  
Circuit Judge Raymond C. Fisher  
District Judge Ann L. Aiken  
District Judge Frank R. Zapata  
Chief Bankruptcy Judge Randall J. Newsome  
Chief Bankruptcy Judge Gregg Zive  
Bankruptcy Judge Louise DeCarl Adler  
Magistrate Judge Wayne D. Brazil  
Magistrate Judge Valerie P. Cooke  
Magistrate Judge Jeffrey W. Johnson  
Magistrate Judge Kim Mueller  
Chief Circuit Mediator David R. Lombardi  
ADR Program Director Denise M. Asper  
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Ruth V. Glick, Attorney at Law  
Bruce Meyerson, Esq.  
Chief Bankruptcy Judge Barry Russell, Consultant  
Circuit Executive Gregory B. Walters  
Assistant Circuit Executive Robin Donoghue

### **The Western Justice Center Foundation**

This project was funded by a grant under the auspices of the Western Justice Center Foundation (WJCF). The WJCF became operational in 1996 under a grant from the James Irvine Foundation, supplemented by a grant of general support in 1997 from the William and Flora Hewlett Foundation. The WJCF furthers its goal of the development of a peaceful society through its three priority programs: teaching children the skills of peaceful conflict resolution; helping communities resolve disputes without violence; and assisting our nation's courts and administrative agencies to improve access to justice through innovative programs and other practices that increase consumer satisfaction.

WJCF is non-partisan and non-ideological. It nurtures collaboration among diverse groups and creates cost-effective partnerships among organizations to accomplish more than each organization could achieve alone. WJCF is both a local and national resource, providing services and testing new ideas in the greater Pasadena/Los Angeles area, then

communicating results on these and other model practices to a growing national/international constituency.

### **About the JAMS Foundation**

The JAMS Foundation funded the development of this Program Guide. JAMS is a non-profit corporation that provides financial assistance for conflict resolution initiatives with national impact. The Foundation encourages the use of alternative dispute resolution, supports education at all levels about collaborative processes for resolving differences, promotes innovation in conflict resolution and advances the settlement of conflict worldwide.

## *Acknowledgments*

The development of this Program Guide was made possible by a grant from the JAMS Foundation. The Western Justice Center and the Ninth Circuit ADR Committee, whose members shepherded the project forward, are grateful for the JAMS Foundation's generosity and support. This Program Guide was prepared with valuable input from many members of the Circuit ADR Committee and countless lawyers, court staff and neutrals from throughout the Circuit. Special thanks go to Senior Circuit Judge Dorothy Nelson and Magistrate Judge Wayne Brazil, who served as both editors and muses. Their thoughtful and substantial contributions to the content and form of this Program Guide enriched it greatly. Particular thanks also go to Robin Donoghue, who edited the Program Guide and cheerfully oversaw innumerable communications among the Program Guide's many other "editors." The able research assistance of Britnee Reamy and Brette Steele enhanced the Program Guide as well. For his generous contribution of creative ideas, writing and editing expertise and abundant patience and support, gratitude goes to Daniel Bowling.

Dana L. Curtis

## *How to Use the Program Guide*

### **I. Contents of the Program Guide**

Education Programs on Court-Sponsored ADR: Model Programs and Guide to Resources (“Program Guide”) contains information and resources to assist program planners to plan and present ADR-related programs, including ADR-related programs for district conferences.

A. **Program Modules** – The Program Guide contains seven lesson plans (“program modules”) for planning and presenting ADR-related programs. The program modules span a wide range of topics:

1. ADR: A Dialogue among Judges, Lawyers and Clients
2. ADR and the Complex Case: A Conversation
3. ADR and the Corporate Client
4. “Convening” an ADR Process
5. Court-Connected ADR: Mandatory Voluntary
6. Timing of Mediation in Civil Cases
7. What Settlement Judges Want Lawyers to Know and What Lawyers Want Settlement Judges to Know

The program modules are comprehensive plans that provide program organizers and presenters everything they need to prepare and present engaging programs.

The program methodology varies from module to module. Some modules contain a number of methodologies within them, or offer the program organizers a choice of two or more methodologies depending on how much time organizers have allowed for the program, the size of the group or the participants’ interests. Rather than a “talking heads” model, an approach is suggested that has presenters interact with participants.<sup>1</sup>

### **B. Appendix**

1. **Overview of ADR Processes** – descriptions of the ADR processes relevant to the program modules: mediation, early neutral evaluation, non-binding arbitration and settlement conferences
2. **Guide to Court-Sponsored ADR Resource Persons** – a list of judges and court ADR administrators and staff in each district, and nationwide, who have

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<sup>1</sup> It has been estimated that we learn: 10% of what we read; 20% of what we hear; 30% of what we see; 50% of what we both see and hear; 70% of what we discuss; and 80% of what we experience.

ADR knowledge, skill and experience and could help organize the program or participate as program presenters.

3. **Ninth Circuit ADR Program Evaluation Form** that program presenters may distribute to attendees of the ADR programs.

## **II. How to Use the Program Guide**

### **A. For Program Organizers**

1. Get a broad overview of the program modules – At a minimum, read the first two sections of each module, the Program Overview and Program Objectives, which summarize the content of the program modules.
2. Assess the district's needs related to ADR – Gather information from the district conference planning committee, judges, lawyers and ADR-related administrative staff concerning which of the program modules would meet the district's most pressing needs or would be most interesting and relevant to district conference participants.
3. Select a module.
4. Recruit three or four volunteers who will serve as program organizers.
5. Review thoroughly and perhaps modify the program module to suit the needs of the district.
6. Select program presenters – Each module provides criteria for selecting presenters. The Program Guide also provides the names and contact information of individuals in each district who have expertise in ADR, as well as information about individuals who are nationally recognized for their expertise in ADR.
7. Meet to plan the program – Program organizers and presenters should meet to discuss, and in some cases rehearse, the program.

- B. For Planning and Sequencing Multiple Programs** – In some cases, the district conference planning committee may decide to offer a number of programs over several years.

- C. Other Uses** – In addition to district conferences, the Program Modules can be used for planning and presenting programs in other contexts, for example:

1. Bench-bar programs other than the district conferences
2. Continuing education programs for neutrals in the districts' ADR programs
3. State bar annual meetings or mid-year conferences
4. Local bar association meetings or programs
5. American Inns of Court

### III. Evaluating Programs and Providing Feedback

Periodically, this Program Guide will be revised to enhance its quality and relevance. ***Feedback about the program modules from those who read and, especially, those who implement them is essential to the Program Guide's development.*** Updates of the Program Guide will be posted on the Circuit's website: <http://www.ce9.uscourts.gov/adr>.

Please assist us to improve the program modules in this edition and to develop future modules by submitting the feedback form at the end of each program module. In addition, we would appreciate your also sending copies or a summary of the program evaluations completed by the program participants.

***Program A***  
***ADR: A Dialogue among Judges, Lawyers and Clients***

**Program Overview**

This program provides a forum and a structure for lawyers, clients and judges to talk with one another about issues related to and their concerns about the district's ADR program. Within the same district, judges have divergent views about ADR. If lawyers more fully understand the judges' views about ADR, they will be better equipped to serve their clients' ADR needs and preferences. And judges can benefit from understanding the attorneys' views, and those of their clients, on ADR issues. This dialogue can also inform ADR program leaders about needs and concerns of those affected and served by the ADR program.

**Program Objectives**

1. For lawyers, judges and clients to exchange views about ADR and the district's ADR program
2. For lawyers to understand the district judges', bankruptcy judges' and magistrate judges' perspectives on, and practice regarding, ADR
3. The district judges', bankruptcy judges' and magistrate judges' major concerns regarding lawyer participation in ADR processes
4. For judges to understand the ADR-related needs and concerns of lawyers and their clients
5. For lawyers and judges to examine how they can more effectively contribute to the effectiveness of the district's ADR program
6. For ADR leaders to understand judges' and lawyers' (and their clients') needs and concerns related to ADR and to get feedback concerning the district's ADR program
7. In districts that are revising the ADR program and/or its local rules, for ADR leaders to develop potential changes in the court's ADR program or in specific local rules

**Time for the Program**

<b>Activity</b>	<b>Time</b>
Moderator's opening presentation	5 minutes
Panelists' presentations	15 minutes
Dialogue groups	35 minutes
Dialogue group reports	15 minutes
Questions and responses (optional – Allocate time to another activity if it is not used here.)	10 minutes
Concluding remarks by dialogue leaders/panelists	8 minutes
Concluding remarks by moderator	<u>2 minutes</u>
<b>Total time</b>	<b>90 minutes</b>

## **Program Presenters**

1. **Moderator:** The moderator should have experience with court-related ADR issues, perhaps as an administrator or judge who is involved in the administration of the court's ADR program.
2. **Dialogue Leaders/Panelists:** Dialogue leaders fall into two categories: those who serve as panelists for the large group presentations, in addition to leading dialogue groups, and those who lead dialogue groups but are not panelists. The four or five dialogue leader/panelists introduce the program's topic in brief presentations about court-related ADR issues that most concern them. At the end of the program, they also present brief concluding comments.
3. **Dialogue Leaders:** Each table should have a dialogue leader, who begins the conversation, guides it and, if necessary, encourages it by raising issues.
  - The background and experience of the dialogue leaders, especially those who participate in the demonstration, should be varied to mirror the composition of the dialogue groups, which should include the following:
    - Several judges who conduct settlement conferences, preferably District, Magistrate or Bankruptcy judges with strong views about ADR
    - Lawyers with substantial experience representing clients in the district's ADR program processes, both from the private bar and the local U.S. Attorney's office civil division
    - ADR program leaders – one of the following: administrator, judge, lawyer or layperson
  - Program organizers should provide panelists with citations to the reading materials and the written materials that are part of this program module to facilitate their preparation. All dialogue leaders should be involved in the planning process and any rehearsals for the program, whether or not they are part of the initial demonstration.

**Room Set-up and Seating:** The moderator and dialogue leaders should sit on a dais or stage, in order to be visible to participants. Participants should sit at round tables that seat 6-8. To work most effectively, table seating must be organized to ensure that each table has at least one judge, lawyer, ADR program leader and client (if possible). Organizers can pre-assign table seating and instruct participants where to sit as part of the registration or check-in.

**Instructions for the Program:** The success of this program depends in large part on the leaders' ability to structure and model the small group dialogues. Leading the dialogues effectively will ensure that any propensity for participants to complain and criticize is redirected to constructive conversation in which problems translate into thoughtful and valuable feedback to all participants, especially to the court, about how ADR programs can be improved and modified to better serve the litigants and lawyers.

1. **Moderator's Opening Presentation (5 minutes):** The moderator welcomes participants, introduces the dialogue leaders, and introduces the program by describing its structure, agenda and objectives. An effective introduction to this program is especially critical to its success. In addition to these introductions, this opening presentation must set a tone and create an atmosphere for learning, by stimulating and encouraging the audience to exchange ideas, attitudes and concerns about ADR. The moderator should also explain how the dialogue group discussions potentially benefit the participants, as well as the court.
2. **Panelists' Presentations (15 minutes):** In 3-5-minute presentations, the panelists each raise one or two ADR-related issues that most interest or concern them that they believe are fundamental to the district's ADR program. They can elaborate on their issues by explaining why the issues are important and relevant to the current situation in the district's ADR program. Panelists might also choose to encourage the participants to give their views on these issues during the dialogue group portion of the program.
3. **Dialogue Groups (30 minutes):**
  - a. ***Set-up for Dialogue Groups:*** The moderator instructs the participants about both the structure and procedures for the dialogue groups, as follows:

Participants prepare for dialogue group exercise by answering questions individually. Project the questions on a PowerPoint screen; write them on poster paper; or duplicate and distribute them to the audience. The moderator asks the participants to think about their response to these questions and make notes to use in the dialogue groups.

- **Judges** – What are the attitudes/philosophies/theoretical underpinnings that inform my approach to court-connected ADR?
- **Lawyers** – What are my needs and concerns related to ADR and the district's ADR program? What are my clients' needs and concerns? What does the district's ADR program do effectively? How could it become more effective?
- **ADR program leaders** – What could judges and lawyers do to make the ADR program more effective?

Participants meet in dialogue groups

- 5-6 persons per group
- Ideally, include in each group a judge, lawyer or person connected with the ADR program (program leaders, administrators, etc.)
- Select a scribe, who will take notes and report back the most important points raised in the dialogue group

- b. ***Small Group Discussion:*** Dialogue group leaders begin the discussion, guide it if the participants stray from the structure and, if necessary, encourage it by raising relevant issues. Participants discuss the questions raised above in the individual preparation. They treat the discussion as a dialogue, raising questions among themselves as they arise in the discussion.
4. **Dialogue Group Reports and Discussion (10 minutes):** If the discussion leader/panelists have served as discussion leaders, they return to the dais. The moderator leads the reports by calling on the scribes for each group. Scribes stand at their tables and report the main points. If there are only a few tables, the moderator may choose to write the suggestions on a whiteboard or an easel pad. For programs with more than four tables, the moderator may ask the scribes to submit their respective lists, so that the program organizers will have the option of collecting the information for future use.
5. **Questions and Responses (optional) (10 minutes):** Following the reports, the moderator and or panelist/dialogue leaders may wish to facilitate a question-response period in the large group to allow participants to direct questions to particular groups or to individuals who raised specific concerns. Because the entire program is interactive, this part of the program is optional. If program organizers do not include the question and responses segment, they may allocate time to other activities.
6. **Concluding Remarks by Dialogue Leaders (8 minutes):** Dialogue leader(s) conclude the session in a manner that does justice to the session, including any or all of the following:
  - Briefly (1-2 minutes) summarizing the session and thanking the other dialogue leaders and the audience for their participation
  - Encouraging the audience to incorporate concepts they have learned and consider modifying their approaches to ADR based on the input they receive
  - Encouraging the audience to continue to engage in learning conversations with one another about ADR and other subjects that matter to them as lawyers, judges and administrators
7. **Concluding Remarks by Moderator (2 minutes):** The moderator thanks the panelists, dialogue leaders, and participants. If the organizers plan any follow-up, the moderator announces these plans.

### **Written Materials**

1. Instructions for Panelists and Dialogue Leaders
2. Concerns of Judges, Lawyers and Clients about Court ADR Programs

**Possible Follow-up:** To make the most of this program, the moderator could request that the scribes hand in their respective lists. A volunteer could assemble the lists and the suggestions from the panelists and create a composite list of suggestions for distribution

to district conference participants, and/or a volunteer could write a newsletter or local bar magazine article summarizing the suggestions. Either of these approaches would increase the likelihood that program participants retain and apply concepts they learn. Alternatively, a volunteer could turn the suggestions into a document to be sent to all judges and lawyers along with the notice setting a settlement conference, and/or the court could post the information on its website.

## **Resources**

### **Publications**

1. Brazil, Wayne, D., "Court ADR 25 Years after Pound: Have We Found a Better Way?" 18 Ohio St. J. on Disp. Resol. 93 (2002).
2. Brazil, Wayne D., "Should Court-Sponsored ADR Survive?" 21 Ohio St. J. on Disp. Resol. \_\_ (forthcoming in early 2006).
3. Nelson, Dorothy, W., "ADR in the Federal Courts – One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators and the Public," 17 Ohio St. J. on Disp. Resol. 1 (2001).
4. Nelson, Dorothy W., "Which Way to True Justice? – Appropriate Dispute Resolution (ADR) and Adversarial Legalism," 83 Univ. of Neb. L. Rev. 167 (2004).
5. Niemic, Robert J., Stienstra, Donna, and Ravitz, Randall, *Guide to Judicial Management of Cases in ADR* (Federal Judicial Center 2001).<sup>1</sup>
6. Plapinger, Elizabeth, and Shaw, Margaret, "Court ADR: Elements of Program Design (CPR Legal Program 1992).
7. Sanders, Frank E.A., ed., *Emerging ADR Issues in State and Federal Courts* (ABA Section of Litigation 1991.)

**Cross-reference:** Please refer to the program module entitled "What Settlement Judges Want Lawyers to Know and What Lawyers Want Settlement Judges to Know" for additional ideas or articles related to this program.

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<sup>1</sup> The Federal Judicial Center website (<http://www.fjc.gov>) provides this document and many other ADR related publications.

## ***ADR: A Dialogue among Judges, Lawyers and Clients***

### ***Instructions for Panelists and Dialogue Leaders***

**Role of Dialogue Leaders/Panelists:** Dialogue leaders fall into two categories: four or five individuals serve as panelists for the large group presentations, in addition to leading dialogue groups (dialogue leaders/panelists), and those who lead dialogue groups but are not panelists (dialogue leaders).

#### **Tasks for the Dialogue Leaders/Panelists in Introducing the Program**

1. Introduce the program's topic in brief presentations about court-related ADR issues that most concern them. At the end of the program, they also present brief concluding comments.
2. Coordinate their presentations with the program organizers and use the written materials included at the end of this program module, to prepare ("Possible Concerns of Judges, Lawyers and Clients about Court ADR Programs.")

#### **Tasks for Dialogue Leaders in Setting up the Dialogue Groups**

1. **Instruct the group to select a scribe** who will take notes and report back to the large group the small group's advice.
2. **See that group members have responded to questions raised by the moderator.** Prior to beginning the dialogue groups, the moderator will instruct all the participants to prepare for the dialogue group exercise by answering questions individually. The moderator will project the questions on a PowerPoint screen, write them on poster paper or duplicate and distribute them to the audience. The moderator will ask the participants to think about their response to these questions and make notes to use in the dialogue groups. Dialogue leaders should also make notes on their responses to the questions. The questions are:
  - **Judges** – What are the attitudes/philosophies/theoretical underpinnings that inform my approach to court-connected ADR?
  - **Lawyers** – What are my needs and concerns related to ADR and the district's ADR program? What are my clients' needs and concerns? What does the district's ADR program do effectively? How could it become more effective?
  - **ADR program leaders** – What could judges and lawyers do to make the ADR program more effective?

#### **Tasks for Dialogue Leaders in Facilitating the Discussions**

1. **Get the discussion going:** Ask a couple of the participants at your table to give their individual responses to these questions. Then begin to discuss these questions. Treat the discussion as a dialogue, raising questions as they arise in the discussion.

2. **Guide the discussion:** Facilitate a conversation and encourage everyone in your group to participate actively. Do not let a few people dominate the discussion; make certain to invite others to speak.
  - Encourage the judges to use this opportunity to give advice to lawyers about their perspective on the district's ADR program. Encourage lawyers and other participants to give advice to judges from their experience, as well as concepts they have learned from others. Encourage the court staff to offer insights from anecdotal complaints or stories they have heard.
  - If the discussion lags, use the written materials that are included at the end of this program module – “Possible Concerns of Judges, Lawyers and Clients about Court ADR Programs” – to prompt the dialogue.

## ***ADR: A Dialogue among Judges, Lawyers and Clients***

### ***Concerns Judges, Lawyers and Clients Might Have about Court ADR Programs***

#### **Concerns Judges Might Have about Court ADR Programs**

1. Will the ADR program interfere with or unfairly burden the litigants' access to trial?
2. Does the program implicitly denigrate the jury trial?
3. Does the program result in higher settlement rates, thus reducing judges' opportunities to preside at trials, to perform core judicial functions and, by hearing significant cases, to play a major role in matters of consequence to the community? Should this matter?
4. Does the program impose net cost and personnel costs on the court, diverting limited court resources from core judicial functions, or does it result in net savings of court resources?
5. Are court ADR programs changing the nature of judicial institutions – converting them from houses of publicly adjudicated justice to smorgasbords of services, some of which are designed to be as different from traditional adjudication as possible?
6. Can the court maintain an appropriate level of quality control over the ADR services its neutrals provide – so that the program is not perceived as constituting a second-class system of justice but, instead, enhances public respect for, and gratitude toward, the court?
7. Will the institutionalization of ADR discourage lawyers from taking earlier initiative to try to settle their cases? Does it encourage lawyers simply to wait for the ADR event – even when they may not need ADR to settle the case?
8. By providing only one or two kinds of ADR, will the court's program discourage innovation and flexibility? Will it discourage lawyers and parties from thinking carefully about what kind of process would best fit the specific needs of their case?
9. Will counsel and clients appreciate the many different ways they can benefit from ADR and try to take full advantage of its potential, or will they underestimate its potential and underutilize it?
10. Will participation in the ADR event become perfunctory, becoming just another ritual that makes no meaningful contribution to disposition?
11. Will the court and/or parties be able to identify accurately the cases that are appropriate for ADR?
12. Will the court and/or parties be adept at matching cases with the particular kind of ADR (mediation – both facilitative and evaluative, early neutral evaluation, non-binding arbitration, mini-trial, summary jury trial, med-arb, etc.) that is most promising for the particular case?

## Concerns Lawyers and Clients Might Have about ADR Programs

1. Will the court ADR program impose additional unproductive cost barriers to getting to trial?
2. Will the range and character of the benefits that participation in the ADR program delivers to parties and their lawyers justify the burdens that participation entails?
3. Will referral to the ADR program delay access to case management from the judges, delay hearings on motions or delay access to trial?
4. Will the court force cases into an ADR track or event even when the referral is not likely to be productive or when litigants who are well informed about ADR do not choose to use it?
5. Will the court be open to suggestions from counsel and clients about which ADR process best suits their particular case, or will the court force all parties into a one-size-fits-all ADR proceeding?
6. Will the neutrals in the court's program put too much pressure, or not enough pressure, on parties to settle?
7. Will the neutrals be competent, in process tools and subject matter expertise, and will they play appropriate roles? Or will their interventions and opinions make settlement more difficult to achieve?
8. Will the neutrals invade the relationship between attorney and client, *e.g.*,
  - By suggesting that the lawyer's analysis or advice is not reliable,
  - By pressuring the client to follow a course the lawyer thinks is unwise, or
  - By emphasizing how much the client will be required to pay the lawyer over the course of the litigation and suggesting that expense is not justified?
9. Will other lawyers or parties not participate in good faith in the ADR process, but, instead
  - Use it to increase costs for others,
  - Use it as a cheap vehicle for discovery, or
  - Use it as a means to gain access to counsel's work product or trial strategy?
10. Will the existence of the court's ADR program make it more difficult to secure a settlement conference hosted by a magistrate judge, a bankruptcy judge or a district judge? Will the court use its ADR program as an excuse for not providing judicially hosted settlement conferences?
11. Will the ADR neutrals communicate, surreptitiously or otherwise, with the judge who is assigned to the case?
12. Will the neutrals disclose confidential mediation communications to the assigned judge, or report back to the assigned judge any parties who failed – in the neutral's view – to participate in “good faith,” had the weaker positions or prevented a reasonable settlement from being achieved?
13. Will the court punish parties for not settling their case through the ADR program, *e.g.*, by pushing their case back in the trial queue or responding slowly to motions or other pretrial needs?

## ***ADR: A Dialogue among Judges, Lawyers and Clients*** ***Feedback Form***

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: \_\_\_\_\_

Tel. no.: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Location of the program: \_\_\_\_\_

1. How did you use the module? If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

2. How can we improve the module?

3. How can we improve the Program Guide?

4. What additional questions might we include to stimulate discussion in the dialogue groups?

5. What additional concerns did the participants raise about the district's ADR program?

6. Please provide suggestions for future ADR program modules.

## ***Program B***

### ***ADR and the Complex Case: A Conversation***

#### **Program Overview**

This program consists of a focused and directed conversation that inspires the participants to think creatively about how to use ADR in all phases of complex cases, from the pre-filing stage through appeal. At the outset a moderator and several individuals who will later serve as facilitators present either a hypothetical or an actual case that is representative of the most common type of complex cases filed in the district. Thereafter, the participants, in small groups, have conversations about creative approaches to using ADR in the case. The focused conversation design ensures that the program is not the typical “talking heads” panel presentation, on the one hand, or an open-ended, undirected conversation among facilitators and attendees with no clear purpose, on the other.

#### **Program Objectives**

1. To explore the issues and questions involved in selecting the appropriate and creative uses for ADR in complex cases
2. To learn the views of plaintiffs, defendants, court administrators, district judges, magistrate judges and bankruptcy judges on these questions
3. To have a purposeful conversation about creative ADR approaches and criteria to determine which ADR processes might be appropriate in complex cases that are typical in the district
4. To create a specific product – a list of creative ADR approaches and the criteria to determine which approaches are appropriate within the district, which can become a document provided to attorneys who file cases in the district or can be put on the court’s website

#### **Time for the Program**

<b>Activity</b>	<b>Time</b>
Introductory comments	10 minutes
Presentation of the case	20 minutes
Small group conversations	30 minutes
Small group reports	15 minutes
Concluding small group conversation	10 minutes
Concluding remarks	5 minutes
<b>Total time</b>	<b>90 minutes</b>

#### **Program Presenters**

1. **Moderator:** The moderator, selected from among the program organizers, should have familiarity with complex litigation in the district and with the district’s ADR program.

2. **Facilitators:** The facilitators should have experience with complex cases, either as court administrative staff, lawyers, judges, neutrals or court ADR staff. At least one should have experience with the type of complex case to be used in the program. In addition, they should

- Be engaging speakers
- Have flexible presentation styles
- Have excellent group participation skills
- Be respected within the district
- Have experience facilitating groups in a manner that encourages open participation.

If possible, all facilitators should participate in planning the program or, at a minimum, meet with the program organizers at least once prior to the program to be instructed about facilitating the conversations. A few of the facilitators will be used to present the complex case to the audience to begin the program; however, the main role of the facilitators is to participate in and guide the conversations at the small group tables.

**Room Set-up and Seating:** The moderator and facilitators who present the complex case should sit on a dais or stage in order to be visible to participants. The rest of the facilitators and the participants should sit at round tables that seat 6-8. There should be one facilitator per table. To work most effectively, table seating must be carefully organized to ensure a sufficiently diverse representation of lawyers (plaintiff and defense), judges and court administrative personnel to create interesting and engaging conversation. Ideally, a table of 6-8 should include a district judge, a magistrate judge and/or a bankruptcy judge, a defense lawyer, a plaintiff's lawyer and a member of the court staff. Tables can be organized by pre-assigning table seating and instructing participants where to sit as part of the registration or check-in process.

### **Instructions for the Program**

1. **Planning the Program:** This program requires the program organizers, who will likely also be the moderator and facilitators, to be familiar with the facts and law of the case on which they will focus and to have considered the opportunities for the use of ADR in the case.
  - a. **Distinguish this focused and directed conversation from other kinds of programs:** The success of this program depends upon the ability of the moderator and facilitators to structure the program as a true conversation among the facilitators and participants. The conversation has the following three distinguishing elements:
    - It is focused on program objectives.
    - It has a clear, intentional design to accomplish those objectives.
    - The facilitators perform dual roles of (i) leading the conversation by contributing to its content, rather than making formal presentations, and

(ii) facilitating the conversation process and structure while also participating in the conversation with one another and the audience.

- b. **Select the complex case to use in the program:** The focus of this program is a complex case that is typically litigated in the district where the program will be presented and with which the attorneys, mediators, court personnel and judicial officers who are selected to facilitate the conversation are familiar. Each district has its own litigation profile, and the types of complex cases that predominate in each district will vary. The following list describes various types of complex cases:

- Multi-party cases in which coordination of settlement discussions is complicated
- Multiple, related lawsuits, where coordinated settlement discussions may bring greater efficiency and consistency to the administration of justice
- Environmental cases, such as superfund litigation; siting of utility facility, highway, or other public works projects; toxic contamination; or multi-governmental agency regulatory matters
- Class actions, such as mass tort for personal injury, securities, product liability and employment discrimination or discrimination under the Americans with Disabilities Act
- Antitrust litigation
- Complex administrative regulatory matters involving rates or licenses
- Intellectual property cases
- Cases in which the parties may jointly have an interest in focusing resources on injunctive relief

In selecting the case, organizers might also consider using a recent, notorious complex case from the district.

- c. **Obtain relevant information about the chosen case:** Program organizers should learn all they can about the selected case, including the following:

- Investigating whether ADR was used in the case
- Hearing from individuals actually involved
- Reviewing public documents from the court file
- Researching news articles

- d. **Consider ADR approaches for all aspects of the case:** Organizers should also think carefully about how ADR was used or might have been used in the case and brainstorm how ADR might creatively be used in all phases of the litigation from pre-filing through appeal. In addition, the organizers should investigate creative ways ADR has been used in other complex cases in the district or in other districts in the Ninth Circuit by talking with ADR staff or judges. To assist in this brainstorming process, use the list of questions regarding the potential use of ADR, provided in the Facilitator's Guide at the end of this module. The purpose

of this brainstorming is to provide the table facilitators with possible uses of ADR in the case if examples are needed to encourage the conversations of the small groups.

- e. **Decide how to use the case in the program:** Organizers may decide to take the simple and straightforward approach of just presenting the facts, law and some uses of ADR in the case during the first part of the program. They may also consider the more engaging alternative of writing a role play focused on using ADR for one aspect of the case, such as using mediation to agree on a discovery plan or a plan to streamline the trial phase by narrowing the issues. To begin the program, some of the facilitators present the role play as a demonstration. Alternatively, the role play could be videotaped prior to the program, edited to ensure the essential points are made within the allotted time and shown to the participants.

Regardless of which approach is taken in presenting the case, the organizers should prepare a brief summary of the facts and law of the case to be handed out to the participants to help them understand the case so that they can more easily and effectively participate in the small group conversations.

## 2. Opening Presentation (10 minutes)

- a. **Moderator's opening comments:** The moderator introduces the program by
  - Welcoming the participants
  - Discussing the potential and the significance of ADR processes in complex cases – the particular value to parties of alternatives to litigation in complex cases
  - Describing the program's objectives (See the first page of this program module.)
  - Reviewing the agenda and describing the program generally
  - Outlining the organizers' process of choosing the sample complex case and the conversation facilitators
  - Inviting the conversation facilitators to introduce themselves
- b. **Facilitators' opening comments:** The facilitators will each introduce themselves with a brief description of
  - Their affiliation and practice/role
  - The types of complex cases they handle
  - Their experience with ADR processes in complex cases

**3. Complex case presentation, role play demonstration or role play videotape (20 minutes)**

- a. Purpose in presenting the case:** The purpose in presenting the complex case is to encourage audience participation and discussion of the issues and questions about the creative use of ADR to resolve complex cases within the district. Therefore, the more lively the introduction of the case, the more engaged the audience will be in the directed, focused conversation.
  - b. Complex case presentation:** The simple approach to describing the selected complex case is for three facilitators to give a detailed presentation of the facts and law of the case, focusing only on the details that are relevant to exploring the potential, creative uses of ADR. The first facilitator summarizes the relevant facts, and the second facilitator summarizes the relevant law. The third facilitator outlines the phases of the litigation, from pre-filing through appeal and, if ADR was used in the case, describes how it was used. The third facilitator can also give a few examples of the creative ways ADR has been used in other complex cases in the district or in other districts in the Ninth Circuit. If the case is hypothetical, one way to liven up this approach is to include some unorthodox uses of ADR, which would not likely be seriously considered but may encourage the discussion.
  - c. Presenting the complex case using a role play or videotape:** Rather than presenting the case in a discussion, the facilitators may choose to present the case through a role play of a scene from an ADR session in which they focus on some approach to using ADR in the selected case, such as using mediation to agree on a discovery plan or a plan to streamline the trial phase by narrowing the issues. If they use a role play, facilitators should shorten the initial presentation of the case to leave time for the role play.
- 4. Small Group Conversations (30 minutes):** Following the case presentation, the facilitators each sit at a table to facilitate the conversations about the selected case and ADR. There should be one facilitator per table. The facilitator asks for a volunteer to act as a scribe for the table, using an easel pad, if provided, or taking notes. The facilitators should use the Facilitator's Guide at the end of this program module to assist them in guiding the small group conversations.
- a. Brainstorming:** The facilitator opens the conversation for a lively brainstorming of possible ADR approaches, given the facts and law of the presented case. The facilitator encourages the participants to engage in conversation and to brainstorm freely without initially evaluating the ideas. The Facilitator's Guide includes questions designed to encourage brainstorming.

- b. **Evaluating the ideas:** The facilitator instructs the group to generate a list of criteria for the appropriate use of ADR in complex cases and evaluate the ideas suggested in the brainstorming session against the criteria.
  - c. **Accumulating suggestions:** Finally, the facilitator encourages the participants to decide on the specific ideas their group will present to the larger group for inclusion in a document to be provided to attorneys when they file a case in the district or put on the court's website. Each group should generate two lists of ideas: one focused on the criteria for selecting the appropriate use of ADR in complex cases in the district and a second list focused on potential creative uses of ADR.
5. **Small group reports (15 minutes):** The moderator leads the reports by calling on the scribes from each small group. Scribes stand at their tables and read the two lists they generated of (1) criteria for selecting ADR in complex cases and (2) ideas for creative uses of ADR. The moderator asks the scribes to hand in their lists at the conclusion of the program, so that the program organizers will have the option of transcribing the information for future use.
6. **Concluding small group conversations (10 minutes):** The moderator invites the participants at each table to engage in a concluding conversation about any additional ideas generated by what they heard from the other groups. Scribes should take notes on this conversation, as well.
7. **Concluding remarks (2 minutes):** The moderator should thank the organizers, facilitators, and participants, and conclude with a succinct statement of what he/she believes to have been the value of the program.

### **Written Materials**

- 1. Conversation Facilitator's Guide
- 2. Facts and law relevant to the complex case (to be developed by program organizers)

**Possible Follow-up:** To make the most of this program, the moderator could request that the scribes hand in their respective lists. A volunteer could assemble the lists and the suggestions from the facilitators and create a composite list of suggestions for distribution to district conference participants, and/or a volunteer could write a newsletter or local bar magazine article summarizing the suggestions. Either of these approaches would increase the likelihood that program participants retain and apply what they learn. The information could also be posted on the court's website.

## **Resources**

### **Publications**

1. ABA Section of Dispute Resolution Magazine, ADR in Complex Cases, Summer 1999. The entire issue is devoted to the topic. (This document is available at <http://www.abanet.org/dispute/magazine/home.html>.)
2. Cowell, Susan E., "Pretrial Mediation of Complex Scientific Cases: A Proposal to Reduce Jury and Judicial Confusion," 75 Chi.-Kent. L. Rev. 981 (2000).
3. Environmental Protection Agency, United States Environmental Protection Agency ADR Report, <http://www.epa.gov/adr/adrrept.pdf>.
4. Greenberg, Myron S. and Blazina, Megan A., "What Mediators Need to Know about Class Actions: A Basic Primer," 27 Hamline L. Rev. 191 (Spring 2004).
5. Lemley, Kevin M., "I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes," 37 Akron L. Rev. 28 (2004).
6. Posin, Daniel Q., "Mediating International Business Disputes," 9 Fordham J. Corp. & Fin. L. 449 (2004).

### **Videos**

**The following videos are available for purchase from the Center for Public Resources, <http://www.cpadr.org>.**

1. *Mediation in Action* video is available without CLE accreditation and involves a commercial contract dispute and demonstrates a complete mediation with counsel and client participation in 36 minutes with commentary on mediation phases.
2. *Out of Court – The Mini-trial* is a 30-minute videotape that demonstrates how a mini-trial is utilized to successfully resolve a dispute that resulted from a transnational shipping accident.
3. *Resolution through Mediation* is available without CLE accreditation and is a 28-minute videotape, produced by the International Trademark Association in cooperation with the CPR Institute, and depicts the resolution of a seemingly intractable trademark dispute between a Russian distillery and an American manufacturer and distributor of alcoholic products. A study guide accompanies the videotape.

## ***ADR and the Complex Case: A Conversation Conversation Facilitator's Guide***

1. **Focusing the conversation:** The success of this program depends upon the ability of the moderator and facilitators to structure the program as a true conversation among the facilitators and participants. This particular kind of conversation has three distinguishing elements:
  - It is focused on program objectives.
  - The program has a clear, intentional design to accomplish those objectives.
  - The facilitators perform dual roles of (i) leading the conversation by contributing to its content, rather than making formal presentations, and (ii) facilitating the conversation process and structure while also participating in the conversation with one another and the audience.
2. **Questions to encourage conversation regarding using ADR for all aspects of complex cases in the district:** Below is a list, organized by phases of litigation, to assist in the small group conversations to generate brainstorming of potential creative uses of ADR in complex cases in the district. Facilitators should focus on the questions that are most relevant to the case presented in the program.

### **Pre-filing**

- Are there reasons why exploring a pre-filing resolution might be worthwhile, such as desire for an expeditious, less costly or private resolution to the dispute?

### **Pre-discovery**

- Any pleading or scheduling issues that would lend themselves to ADR, for example, using ADR in lieu of a 12(b)(6) motion to identify the essential claims of the case?
- Any jurisdictional issues?

**As the parties consider an ADR process** (to determine whether ADR is advantageous and, if so, which process – mediation, a settlement conference, early neutral evaluation, non-binding or binding arbitration, summary jury trial, mini-trial or med-arb – would be most appropriate)

- Any issues involving the selection of ADR providers?
- What creative and unusual approaches to ADR might be appropriate, if you were to think “outside the box” about the potential of ADR in complex cases in the district?
- Any issues involving management of a group of related mediations or non-binding arbitrations?
- How could mediation be used to organize the case management process, including creating an ADR plan for the entire process of the litigation in this case?

- Are there cases involving environmental or other public policy issues that might be effectively resolved through a public policy consensus building facilitated process under court supervision?

### **Discovery**

- Is it appropriate to appoint a special master solely to oversee the discovery process using mediation?
- Could an early conference with the judge assigned to the case be used to create a discovery plan?
- How might magistrate judges be effectively used in the discovery process?
- Could a mediated process determine the procedures and guidelines for discovery and present an agreement to the court for review and approval?
- Could a mediated or arbitrated process be set up to resolve disagreements regarding the extent of discovery on particular issues in order to avoid the delay and case management issues arising from handling such matters through motions?

### **Expert and/or scientific evidence**

- Is it appropriate to appoint a special master to locate and evaluate the credentials of neutral experts to advise the court?
- Would a mediated process involving parties be more effective to identify an expert?
- Could an ADR provider set up a consensus-building process to supervise a group of scientists conducting experiments and tests in a case involving complex science?
- Could an arbitration panel composed of scientists and attorneys play an effective role in cases involving complex and uncertain science?
- If the case involves numerous scientific experts, could convening a mediation of the experts be used to facilitate understanding, communication, and to discover areas of agreement and areas where differing scientific approaches are being used and resulting in conflict?
- Might mediation be used to narrow the complex, scientific factual issues?

### **Motions**

- Could mediation be used to resolve motions?
- What impact might such a procedure have on the enforcement of court rules and precedent?

### **Trial**

- Could mediation be used to streamline *voir dire* and jury selection?
- Could mediation help the parties negotiate motions *in limine*, perhaps in a large case allowing them to negotiate an agreement, or trade, concerning numerous *in limine* motions?
- Could mediation be used to narrow or focus the issues to be tried to the jury or to the judge?
- Could mediation be used at the conclusion of various stages of the trial to assist parties to resolve all or some of the remaining issues?

### **Settlement approaches and implementation issues**

- Could an ADR provider administer the awarding of grants under a program set up to settle a complex case such as a toxic tort or tobacco litigation?
- In a complex case involving the over-payment of utility fees by millions of customers, could an ADR provider administer a study, funded by the utility, to determine means to improve services and/or increase public participation in rate-making decisions?
- In a case involving power or water utility re-licensing, could an ADR provider administer a process to study alternative sources of power or water?
- Does an ADR provider's administration of grants, studies, processes or any other post-settlement implementation process – or any other post-settlement implementation vehicle in return for a fee – give rise to a conflict of interest?

#### **Post-trial**

- Could mediation be used to resolve post-trial motions?
- What strategic considerations might the winner and loser at trial have about using ADR to resolve post-trial issues?

#### **Appeal**

- What kind of process would encourage parties to use mediation to resolve or reduce the issues to be heard on appeal?
- Are there special considerations in a complex case, as opposed to a simple case, that might motivate the parties to settle at the appeal stage, for example an interest in a prompt disposition of a complex business dispute involving a corporation whose executives are eager to resolve pending litigation that is an obstacle to pending or future business transactions?
- Why would the party who prevailed at trial (or on a pre-trial motion) want to negotiate a settlement? (They want a prompt disposition for personal or business reasons; the risk of losing the appeal is significant and the appellee's bargaining position is unlikely to improve in the future; an appellate decision in favor of the appellant will merely result in another trial, involving ever more expense and uncertainty.)

### **3. Are there complex cases that might be inappropriate for ADR or that might present special ethical problems?**

- Cases brought in the public interest?
- Cases brought by or against public agencies?
- Class action cases?
- Cases where the law needs further development?
- Cases that raise novel issues?
- Cases that impact constitutional rights affecting large numbers of people?

### **4. Questions to encourage conversation about the criteria to determine the appropriate use of ADR in complex cases in the district:**

- What ADR processes are appropriate for different complex cases and different stages in the litigation process?
- What purposes might ADR serve in complex cases?

- What characteristics make certain cases more appropriate for ADR at different stages?
- What are the timing issues regarding using ADR in complex cases?
- How does the degree of complexity of the case impact ADR issues?
- What characteristics of parties should be considered?
- What have been the typical approaches to ADR in the district?
- What are the underlying interests of the litigants, plaintiffs' attorneys, defense attorneys, administrative personnel and the judiciary in using ADR in a complex case during each phase of the litigation process?
- What are the strategic issues raised for plaintiff and defense attorneys with each use of ADR?
- What are the ethical issues raised for plaintiff and defense attorneys with each use of ADR?
- What communication issues between attorneys and clients and between attorneys are raised by the various ADR approaches in each phase of the litigation?
- What are the case management issues raised for attorneys and court personnel with each use of ADR?
- Are different ADR approaches appropriate depending upon the type of case?
- Who should determine when/how to use ADR?
- How should the various ADR approaches be selected and applied in specific cases?
- What ADR method(s) seem to work best for smaller cases in the district?
  - What are the principal barriers to using ADR in complex cases or in particular kinds of complex cases?
  - What are the potential downsides or risks of using ADR in complex cases or in particular kinds of complex cases?

**5. What are the potential uses of ADR in the complex case described at the beginning of the program?** (The list of issues related to the complex case at the center of the program will be unique to each case. Program organizers should generate a list of issues during program planning, as they consider ways ADR was used or could have been used in the case. See Instructions for the Program, above.)

## ***ADR and the Complex Case: A Conversation Feedback Form***

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: \_\_\_\_\_

Tel. no.: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Location of the program: \_\_\_\_\_

1. How did you use the module?
2. If you presented a program, was the program well received?      What factors likely account for its success or lack of success?
  - Presenters? Please explain.
  - Content? Please explain.
  - Format? Please explain.
3. How can we improve the module?
4. How can we improve the Program Guide?
5. What additional questions do you suggest we include in order to encourage conversation about creative uses of ADR in complex cases at various stages of litigation (or pre-filing)?
6. Please suggest topics for future ADR program modules.

## ***Program C***

### ***ADR and the Corporate Client***

#### **Program Overview**

In this program lawyers, judges and court ADR staff will learn directly from corporate clients about corporate executive and legal staff's perspectives on ADR and their expectations of counsel and the courts regarding ADR-related issues. This program provides a forum for discussing ADR-related issues affecting courts, lawyers and corporate clients. These issues include the following:

1. The impact of costs of litigation on management decisions regarding the following:
  - Insurance coverage, including director and officer, product and advertising liability, both in providing actual defense coverage (insurance company lawyers or paying for private counsel) and ultimate liability coverage
  - Critical business decisions, such as mergers, licensing agreements and sale of the company or the companies assets
  - Budget
  - Day-to-day operations
2. A business climate that discourages litigation (Since the 1990s, corporate management has challenged, or in some cases mandated that, in-house counsel control litigation costs, a trend that has led to the increased use of ADR by corporations. Note also the management attitude toward the justice system that recently led to the Tort Reform Act driven by Silicon Valley executives.)

This program is comprised of panel presentations by corporate counsel and executives of corporations that appear as parties before the district's judges, followed by a question and response period in which the audience will have the opportunity to interact with the panelists.

#### **Program Objectives**

1. To explore corporate attitudes and approaches to ADR in general
2. To educate judges and court administrators about corporate parties' perspectives regarding ADR programs and how the programs serve or disserve corporate parties
3. To understand the role of in-house counsel in ADR decisions
4. To educate lawyers about what corporate clients need from their lawyers regarding ADR
5. To understand what corporate clients need from mediators or settlement judges
6. To consider special problems in mediating with corporations
  - Authority to settle
  - Selecting a corporate representative
  - Preparing for mediation – creating a negotiation strategy with client involvement

- How to “humanize” the corporate party, especially when the relationship and/or one-to-one interaction is important to one or both of the parties

### **Time for the Program**

<b>Activity</b>	<b>Time for 60-minute program</b>	<b>Time for 90-minute program</b>
Introductory comments	10 minutes	10 minutes
Panel presentations	35 minutes	55 minutes
Questions and responses	10 minutes	20 minutes
Concluding remarks	5 minutes	5 minutes
<b>Total time</b>	<b>60 minutes</b>	<b>90 minutes</b>

### **Program Presenters**

1. **Moderator:** A moderator with experience in ADR issues, perhaps a lawyer who represents corporate clients in litigation and in the district’s ADR processes
2. **Panelists:** Program organizers should invite knowledgeable, articulate and entertaining speakers, who might include the following:
  - One or two representatives of corporations that appear in litigation and ADR processes in the district (It will be helpful if the corporation has signed the Center for Public Resources’ ADR Pledge and if the representative has had considerable experience with judicial settlement conferences as well as ADR processes. A copy of the ADR Pledge can be found at the CPR website, <http://www.cpradr.org>.)
  - CEOs, CFOs or other corporate executives who have participated in ADR as the "authority-to-settle" person and can offer insights into the non-lawyer perspective in participating in ADR processes
  - Corporate counsel or directors of litigation, who can speak with authority about the issues because they have direct involvement with managing litigation or directing policy concerning it
  - A lawyer who represents large corporate clients in litigation and ADR processes in the district
  - A plaintiff’s lawyer with substantial experience representing individuals, such as plaintiffs in employment cases or small businesses in suits against larger corporations, who has participated in the district’s ADR program (One role of such a panelist could be to respond to what the corporate panelists say, so that the audience can hear how the ideas and approaches the corporations favor might be received by, or affect, their common litigation opponents and to add a sense of balance to the presentations.)
  - A presenter who can speak from the insurance company perspective
  - A neutral with significant experience mediating or arbitrating disputes involving corporate parties

## **Room Set-up and Seating**

The panelists and moderator should sit on a dais or stage in order to be visible to participants. Participants should be seated theater style.

## **Instructions for the Program**

1. **Opening Presentation (10 minutes):** The moderator introduces the panelists and the topic by making introductory comments about the topic and presenting an overview of the program objectives and agenda.
2. **Panelists' Presentations (35 or 55 minutes, depending upon whether this program is scheduled for 60 or 90 minutes):** Each panelist makes a five to ten minute presentation. Program organizers should encourage panelists to use visual aids and to submit written materials to distribute to the participants. In order to allow panelists to prepare adequately and to avoid redundancy, panelists, once selected, should tell program organizers the topics they would like to address. Suggested topics include the following:
  - a. The corporation's attitudes and approaches to ADR in general, especially any institutionalized ADR policies (For example, some companies require their lawyers to sign the CPR Lawyer Pledge or to be trained in mediation. Others use ADR for resolving internal problems or disputes – with employees, between employees, between units – or in contexts other than litigation, such as in transactional work or in connection with real estate needs.)
  - b. How ADR has proved to be most effective – and the types of corporate disputes that are most amenable to ADR
  - c. Examples of creative solutions developed in ADR that go beyond money
  - d. The company's perspective on court-connected ADR programs, including how they serve or fail to serve corporate parties
  - e. Suggestions for how the court's ADR program might better serve corporate clients
  - f. The role of in-house counsel in ADR decisions
  - g. What corporations need from or require of their lawyers regarding ADR
  - h. What companies need or look for in selecting mediators or settlement judges
  - i. How ADR can be used to defuse distrust of the corporate litigant and build the corporation's credibility with individual plaintiffs and their lawyers (For example, corporations sometimes prefer neutrals who are primarily identified with the plaintiffs' bar, because hiring a neutral with this background may increase the individual plaintiffs' trust in the process.)
  - j. What are considered to be the most important special problems in mediating with corporations, perhaps including the following:
    - Authority to settle
    - Selecting a corporate representative
    - Preparing for mediation – creating a negotiation strategy with client involvement

- Using ADR to provide the opportunity for individual parties or small business parties to have the experience that they have been understood, respected and taken seriously
  - “How to “humanize” the corporate party, when the relationship and/or one-to-one interaction is important to one or both of the parties
3. Questions and Responses (10 or 20 minutes, depending upon whether this program is scheduled for 60 or 90 minutes): Assuming the panelists have engaged the audience and raised interesting issues in their presentations, this discussion will likely be lively and generate more discussion and questions than the panelists have time to answer. The following list describes several approaches the moderator might employ in facilitating this part of the program:
- a. Moderator invites participants to direct questions to particular panelists;
  - b. Volunteer collects written questions, which contain the names of the panelists to whom the question is addressed, and gives them to the moderator, who distributes them to the panelists. The panelists take turns reading and answering the questions; or
  - c. Sample questions to get the discussion started if the audience is not responsive
    - Are there other issues related to representing or mediating with the corporate client that you would like to hear the panelists address?
    - Lawyers who represent corporate clients, what are your biggest challenges in ADR and how can the court better assist you in meeting them on behalf of your client?
    - Corporate lawyers, at what point in the life of a case do you address the question of whether ADR is appropriate? Do your clients request ADR?

### **Written Materials**

1. ADR and the Corporate Client: Suggestions for Panelists
2. Any articles or other written materials panelists have prepared, either for publication in advance of the program or specially for inclusion in the program materials

### **Resources**

#### **Publications**

1. Lande, John, “Getting the Faith: Why Business Lawyers and Executives Believe in Mediation,” 5 Harv. Negotiation L. Rev. 137 (2000).
2. Lipsky, David and Seeber, Ronald L., “In Search of Control: The Corporate Embrace of ADR,” 1 U. Pa. J. Lab. & Emp. L. 133 (Spring 1998).
3. Mazadoorian, Harry N., “Building an ADR Program: What Works, What Doesn’t,” Business Law Today, ABA Section of Business Law (March/April 1999).

## Videos

The following videos are available for purchase from the Center for Public Resources, <http://www.cpadr.org>.

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## Organizations and websites

1. Association of Corporate Counsel: [www.acca.com](http://www.acca.com)
2. ABA Corporate ADR Committee:  
<http://www.abanet.org/dispute/committees/corporatecom.html>  
(The committee's mission is to be the link between the ABA Dispute Resolution Section and the corporate community. The committee creates opportunities for information sharing, education, discussion and networking for lawyers and neutrals for corporations and in-house counsel.)

## *ADR and the Corporate Client*

### *Suggestions for Panelists*

**The Presentation:** Each panelist will make a five- to ten-minute presentation. We encourage you to make it lively and to use visual aids and submit written materials to distribute to the participants. Please be mindful of the time and know that if you go overtime, you will take away the time from the panelists who follow you.

**The Topics:** Well in advance of the program, please consider the topic(s) you would like to address and inform the program organizers of your chosen topic so that they can avoid overlap and redundancy in the presentations. Below is a list of suggested topics, but please feel free to choose any topic that relates to the program, so long as you clear your choice with the program organizers.

1. The corporation's attitudes and approaches to ADR in general, especially any institutionalized ADR policies. For example, some companies require their lawyers to sign the CPR Lawyer Pledge (see <http://www.cpradr.org>) or to be trained in mediation. Others use ADR for resolving internal problems or disputes – with employees, between employees, between units – or in contexts other than litigation, such as in transactional work or in connection with real estate needs.
2. How ADR has proved to be most effective – and the types of corporate disputes that are most amenable to ADR
3. Examples of creative solutions developed in ADR that go beyond money
4. The company's perspective on court-connected ADR programs, including how they serve or fail to serve corporate parties
5. Suggestions for how the court's ADR program might better serve corporate clients
6. The role of in-house counsel in ADR decisions
7. What corporations need from or require of their lawyers regarding ADR
8. What companies need or look for in selecting mediators or settlement judges
9. How ADR can be used to defuse distrust of the corporate litigant and build the corporation's credibility with individual plaintiffs and their lawyers. For example, corporations sometimes prefer neutrals that are primarily identified with the plaintiffs' bar, because hiring a neutral with this background may increase the individual plaintiffs' trust in the process.
10. What are considered to be the most important special problems in mediating with corporations, perhaps including:
  - Authority to settle
  - Selecting a corporate representative
  - Preparing for mediation – creating a negotiation strategy with client involvement
  - “Humanizing” the corporate client in cases where relationship matters

## ***ADR and the Corporate Client Feedback Form***

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: \_\_\_\_\_

Tel. no.: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Location of the program: \_\_\_\_\_

1. How did you use the module?

2. If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

3. How can we improve the module?

4. How can we improve the Program Guide?

5. What additional topics about ADR and the corporate client do you suggest the panelists consider in preparation for their presentations – and then address in the program?

6. Please suggest topics for future ADR program modules.

## ***Program D***

### ***“Convening” an ADR Process***

#### **Program Overview**

This educational program is designed to explore the many purposes for which lawyers and clients can use a “convening conference” with a neutral to select or design an ADR process that best fits the needs and circumstances of a particular case – and then to take the steps, in advance of the ADR session, that promise to maximize its productivity.

In a convening conference lawyers (and, in appropriate cases, clients) can consider, with the guidance of an experienced neutral, the pros and cons of various forms of ADR: facilitative mediation, evaluative mediation, early neutral evaluation, arbitration (binding or non-binding), summary jury or court trials, mini-trials or settlement conferences. The host of the convening conference (which can be held by phone, video conference or in person) can help the parties select the most appropriate process model – or can help them fashion a hybrid or unique process protocol that incorporates elements or concepts from one or more of the well-established forms of ADR.

After helping the parties select or design a process, the neutral can help them identify and plan to complete the tasks that need to be done in advance of the ADR session in order to make full use of its potential. As part of this process, the neutral can make sure that everyone understands what the process will consist of, what rules (e.g., re confidentiality) will apply, who is expected to attend and what kinds of authority must be secured in advance. During the convening conference the neutral also can help the participants determine whether settlement proposals might include some non-monetary components and, if so, make sure the parties do the homework necessary to determine which kinds of non-monetary terms could be accessible and what the costs and benefits of each of those terms might be (e.g., reinstatement of an employee in a former or a new position, components of a retirement package, terms of a new joint venture, content of a joint press release, terms on which a license or an assignment of rights might be offered, differing tax consequences of different ways of moving value from one party to another, etc.).

The parties also can use a convening conference to identify and schedule any additional discovery, or any focused motion practice, that should be completed before the ADR session. In addition, they can decide what information they should provide the neutral prior to the ADR event and whether it would advance the purposes of the ADR process if the neutral had *ex parte* conversations or communications with the parties before the main session.

The educational program that is built around this topic can demonstrate the richness of the convening opportunity and can open participants to thinking creatively about how they might use it to assist lawyers and the courts to better serve litigants. Because the issues related to convening an ADR process are too numerous and broad-ranging to address adequately in a short program, the program organizers must limit the issues or

allocate more time than the traditional 90-minute format. This program module provides three options to address this issue.

### **Program Objectives**

1. To learn more about convening – selecting, setting up and structuring – an ADR process
2. To explore the questions raised by the convening process related to initiating ADR, designing an ADR process, confidentiality and relationship issues
3. To learn the views of experienced plaintiff, defense lawyers and mediators on these questions
4. To have an opportunity to explore convening issues in specific cases described by the participants

### **Time for the Program**

#### **Option One (120-minute program)**

Activity	Time
Moderator's introductory comments	5 minutes
Panelists' presentation of the convening issues	15 minutes
Demonstration of convening process	30 minutes
Small group discussions	45 minutes
Small group reports & discussion	20 minutes
Concluding remarks	5 minutes
<b>Total time</b>	<b>120 minutes</b>

#### **Option Two (90-minute program, substantially narrowing the issues)**

Activity	Time
Moderator's introductory comments	5 minutes
Panelists' presentation of the convening issues	10 minutes
Demonstration of convening process	20 minutes
Small group discussions	35 minutes
Small group reports & discussion	15 minutes
Concluding remarks	5 minutes
<b>Total time</b>	<b>90 minutes</b>

#### **Option Three (90-minute program, without discussion groups)**

Activity	Time
Moderator's introductory comments	5 minutes
Panelists' presentation of the convening issues	15 minutes
Demonstration of convening process	40 minutes
Questions and responses	15 minutes
Panelists' concluding remarks	10 minutes
Moderator's concluding remarks	5 minutes
<b>Total time</b>	<b>90 minutes</b>

## **Program Presenters**

1. **Moderator:** The moderator should have experience with court-related ADR issues, perhaps as an administrator or judge who is involved in the administration of the court's ADR program or as a neutral in the court's ADR program.
2. **Panelists:** The panel is comprised of three members: a defense lawyer and a plaintiffs' lawyer, who practice in the district's courts, and a mediator who mediates in the district's ADR program or has otherwise mediated district court cases. The panelists make very brief introductory presentations to frame the program's issues; they demonstrate a convening process; and they present concluding remarks.

**Room Set-up and Seating:** The moderator and panelists should sit on a dais or stage in order to be visible to participants. The participants will form small (4-5 person) discussion groups. They should be seated theater style in chairs they can move or at round tables that seat 8-10, so that they can easily move their chairs to form small groups. If the program organizers eliminate the small discussion groups, the participants can sit theater style.

**Instructions for the Program:** The abundance of convening-related issues requires the program organizers to make careful choices in the planning stage. They should offer a longer, two-hour program or strictly limit the issues for the program's focus. Any attempt to cover all of the possible convening issues will result in the superficial treatment of the issues. (For a list of convening-related issues, see the "*Program Notes for Moderator and Panelists*," included at the end of this program module.)

### **1. Options One and Two (with small group discussions)**

- a. **Moderator's Introductory Comments (5 minutes):** The program opens with the moderator's presentation of an overview of the program and the program objectives. The moderator then introduces the panelists and gives introductory comments about the convening issues.
- b. **Panelists' Presentation of the Convening Issues (15 minutes, 120-minute program/10 minutes, 90-minute program):** Panel members make brief presentations in which they give their perspectives on issues that typically arise in convening an ADR process. The program organizers may encourage the panelists either to discuss the same issues from their different perspectives (this approach is specially recommended for the 90-minute program) or raise different issues. They should focus on issues that are the most relevant to the district's programs and litigation profile, as determined by the program organizers.
- c. **Role Play Demonstration of an ADR Convening Conference (30 minutes, 120-minute program/20 minutes, 90-minute program):** Panelists role play an ADR convening conference facilitated by a mediator. The purpose of the

demonstration is to portray convening-related issues that the panelists raised in their presentations, other issues identified in the “Program Notes for Moderator and Panelists” (included at the end of this program module) or any other issues the program organizers determine to be most significant to the district’s judges and lawyers. The panelists may create their own scenario for the demonstration or use the “Demonstration Role Play Instructions” (included at the end of this program module).

- d. **Small Group Discussions (45 minutes, 120-minute program/35 minutes, 90-minute program):** The moderator introduces the small group discussions by explaining that the purpose of the discussions is to allow participants to explore convening-related issues, to share their experience and knowledge concerning the convening of ADR processes in the district and to think creatively about convening. The moderator instructs participants in the small group activity, as follows:

- Divide into groups of 4-5 to discuss issues to enhance the learning opportunity of this program.
- Strive for a diverse group: plaintiff and defense lawyers, judges, court administrative staff and, especially, mediators, who can provide the mediator perspective on convening issues.
- Select a scribe, who will take notes of ideas and insights from the group for presentation back to the large group.
- Select a group member to facilitate the discussion and keep time.
- The attorneys in the group will present brief descriptions of cases that have been or could be litigated in the district or will identify specific issues or problems they have encountered when trying to choose or prepare for an ADR process. The cases may be hypothetical or real. The group will then brainstorm ADR convening issues regarding these cases.
- Decide, as a group, how the group will use the time allotted for this exercise. One choice is to use your time to focus more deeply on one or two cases. Another choice is to divide the time among all the attorneys who choose to volunteer a case for the group’s consideration.
- Once the group has decided upon its approach, the facilitator allocates the time accordingly, and participants begin the discussion.

After the moderator gives the instructions, the moderator and facilitators distribute the “Participant Instructions for Small Group Discussions” (provided with this program module) to each table and then join a small group to participate in discussions or move from group to group to observe or provide guidance where it is needed.

Program organizers should provide adequate supplies for recording the small group discussions, ideally, easels with pads and markers or, at least, pads and pens for taking notes.

- e. **Debrief Small Group Discussions and Respond to Questions (20 minutes, 120-minute program/15 minutes, 90-minute program):** The panelists and the moderator return to the dais. The moderator invites the scribes from each small group to present a brief report in which they describe a case the group discussed – and summarize the ideas and insights the group members developed as they explored convening-related issues. Following the reports, the moderator invites the panelists and participants to comment or pose questions to any of the scribes or small groups.
- f. **Concluding Remarks (5 minutes):** The moderator thanks the panelists and participants and states what he or she believes to have been the value of the program.

## **2. Option Three (without Small Group Discussions) (90 minutes)**

- a. **Moderator's Introductory Comments (5 minutes):** Same as Options One and Two
- b. **Panelists' Presentation of the Convening Issues (15 minutes):** Same as Option One
- c. **Role Play Demonstration of an ADR Convening Conference (40 minutes):** Same as Options One and Two, except for the time allotted
- d. **Discussions and Questions (15 minutes):** The moderator invites participants to comment or pose questions to any of the panelists.
- e. **Panelists' Concluding Remarks (10 minutes):** The panelists each briefly comment on the program and encourage participants to continue to think about how they might use the convening process more creatively and effectively in their district court cases.
- f. **Concluding Remarks (5 minutes):** Same as Options One and Two

### **Written Materials**

- 1. Program Notes for the Moderator and Panelists
- 2. Participant Instructions for Small Group Discussions
- 3. Demonstration Role Play Instructions

## **Publications**

1. Cohen, Judy, "Convening for Enhanced Self-Determination and Access to the Process," 18 The Texas Mediator 2 (Summer 2003).
2. Porter, Patricia, "Maximizing Effective Participation," 21 Alternatives 6 (June 2003).

## ***“Convening” an ADR Process Program Notes for the Moderator and Panelists***

This section identifies many of the issues that might arise in connection with “convening” an ADR process. The list will help the program organizers plan the program and will help the moderator and panelists prepare their presentations.

### **Initiating an ADR process**

1. What are the primary goals or purposes the parties will be using the ADR process to pursue? What are the parties’ most important for the ADR session?
2. What type of ADR process is most appropriate for this case – non-binding arbitration, mediation (and what approach, e.g., facilitative or evaluative), early neutral evaluation, a settlement conference, summary jury or bench trial, mini-trial or med-arb?
3. What can lawyers do to address the fear that if they raise the topic of ADR first, their opponents will take it as a sign of weakness (fear of being the first to blink)?
4. What are common sources of reluctance and resistance to discussing or even considering ADR? How can opposing lawyers, judges or mediators help overcome a lawyer’s or party’s resistance to trying an ADR process?
5. When should the ADR process be held? What are the timing issues?
6. If mediation is chosen, what kind of mediator will be best for the case, taking into consideration the mediator’s approach to mediation and personal style? Do you have a particular mediator in mind?

### **Designing an ADR process**

1. Should the ADR process be focused on only some of the issues, seek to resolve the entire case, or seek to resolve related cases?
2. Could the convening process, with the help of a neutral, be used to plan the case development process or to determine how to integrate or coordinate the ADR process with other aspects of pretrial preparation?
3. How can parties work together collaboratively with a mediator to design the ADR process?
4. Should the ADR process consist only of joint sessions or should it include private caucuses?
5. If the entire case cannot be resolved in an ADR process, can ADR be used to narrow the issues for trial?
6. Are strategic issues a consideration, including  
Litigation strategies?
  - Potential impact on or from other related or similar cases?
  - Public policy issues that extend beyond the litigation that may be better addressed within an ADR process?
  - Business strategies that extend beyond the litigation?
  - Leverage for some other purpose?
7. What kind of discovery plan should be pursued?

8. Will parties give the mediator a mediation statement? If so, what will it cover? Will it be confidential to the mediator or shared?
9. Who will attend the mediation? Who must be present for the case to settle? How can we assure that persons with the requisite authority will participate?
10. Are there special issues, such as those involving a public entity, which must be considered in convening an ADR process?
11. Would the purposes of using ADR in this case be advanced if expert witnesses or consultants participated?

### **Confidentiality and relationships**

1. How do federal and state law, and the court's local rules, address confidentiality? Which confidentiality law will control?
2. What are the parties' needs regarding confidentiality:
  - In terms of evidentiary protections for the mediation discussions and any documents prepared for mediation?
  - In terms of the confidentiality of separate caucuses?
  - In terms of privacy or secrecy of the discussions in mediation?
3. Does the case present special confidentiality issues?
4. Is a governmental entity a party, and, if so, do sunshine laws or open meeting provisions apply?
5. Is the case high profile, and are parties concerned about publicity?
6. Does the ADR process that would be used raise concerns or issues about preserving the confidentiality of communications between lawyers and clients, or about preserving work product protections?
7. Are there issues related to the parties' or the lawyers' relationships that are important to consider in designing the ADR the process, including the following:
  - Are the parties presently in a continuing relationship, and are they interested in repairing it?
  - Were the parties previously in a close or successful relationship, and are they interested in restoring/repairing it?
  - Is there high conflict between parties?
  - Is there high conflict between lawyers?
  - Do the lawyer and client have communication problems??

## ***“Convening” an ADR Process***

### ***Participant Instructions for Small Group Discussions***

#### **Set-up**

1. Divide into groups of 4-5 to discuss issues related to convening an ADR session. Strive for a diverse group: plaintiff and defense lawyers, judges, court administrative staff and, especially, mediators.
2. Select a scribe, who will take notes of ideas and insights from the group for presentation back to the large group.
3. Select a group member to facilitate and keep time.

**Description of the case:** Attorneys in the group: Present brief descriptions of several cases that you have or are now litigating in the district (or hypothetical cases, if you prefer).

#### **Discussion of ADR convening-related issues**

1. Decide, as a group, how the group will use the time allotted for this exercise. One choice is to use your time to focus more deeply on one or two cases. Another choice is to divide the time among all the attorneys who choose to volunteer a case for the group’s consideration.
2. Timekeeper: allocate time according to the group’s decision.
3. Decide the order in which the group will discuss these cases.
4. Identify and discuss ADR convening-related issues raised in the cases.

**Summary and preparation of the scribe:** In the last few minutes, discuss which insights and ideas the group would like the scribe to convey to the large group during the report and discussion period.

## ***“Convening” an ADR Process Demonstration Role Play Instructions***

### **Mediator’s Role**

You are to act as mediator in a brief demonstration role play of an ADR convening conference. The purpose of the demonstration is to explore the advantages of giving serious attention to the process of “convening” and to help the audience appreciate the contributions that a neutral can make through a “convening conference.”

You have been hired by the attorneys to assist them in sorting through their issues regarding the potential use of ADR for their case and, if they choose to use ADR, how to design an appropriate process. They may, or may not, ask you to consider mediating the case following this convening conference. You are an experienced former civil litigator, with more experience on the plaintiffs’ side but quite a few years in the civil division of the State Attorney General’s office. You have been doing full-time neutral work for 15 years. Your style relies heavily on building relationships with attorneys and parties and facilitating their conversations. You will occasionally give parties an evaluation of the case, but only in caucus and as a last resort to help settle a case that you believe should settle. Contrary to the approach that begins with a brief joint session followed by separate caucuses, you rely on joint sessions to build the relationships necessary to see the case as a joint problem to be solved. Because of your extensive civil litigation experience, you are often called upon to help design ADR processes and particularly discovery plans.

The case arises under the Federal Tort Claims Act. The plaintiffs are a young couple whose baby was born with serious birth defects and subsequently died. The husband has been a commercial fisherman all his life, having begun working at a young age with his father who was also a commercial fisherman. Both parents took extensive blood tests following the birth in an effort to determine what may have caused the birth defects. These tests showed extremely high levels of mercury in their blood. They allege that the defendant, the US Environmental Protection Agency, ignored scientific evidence and agency regulatory procedures and protocols in setting limits on mercury pollution that would line up with the Bush administration’s free-market approaches to power plant pollution.

Plaintiffs also allege that EPA staff members were instructed by administrators, all of whom were political appointees to set modest limits on mercury pollution and then to work backward from those limits to justify a regulatory proposal. Mercury is a toxic metal released as a byproduct by coal-burning power plants and other industries, and it is known to have a range of harmful health effects, especially on young children and pregnant women. You had a brief telephone discussion with the plaintiffs’ attorney and the Justice Department attorney assigned to the case, in which you received a brief overview of the case and scheduled this design conference.

## ***“Convening” an ADR Process Demonstration Role Play Instructions***

### **Plaintiffs’ Attorney Role**

You are to act as plaintiffs’ attorney in a brief demonstration role play of an ADR convening conference. The purpose of the demonstration is to explore the advantages of giving serious attention to the process of “convening” and to help the audience appreciate the contributions that a neutral can make through a “convening conference.”

The case arises under the Federal Tort Claims Act. Your client is a young couple whose baby was born with serious birth defects and subsequently died. The husband has been a commercial fisherman all his life, having begun working at a young age with his father who was also a commercial fisherman. Both parents took extensive blood tests following the birth in an effort to determine what may have caused the birth defects. These tests showed extremely high levels of mercury in their blood. Your complaint alleges that the US Environmental Protection Agency ignored scientific evidence and agency regulatory procedures and protocols in setting limits on mercury pollution that would line up with the Bush administration’s free-market approaches to power plant pollution. Your complaint also alleges that EPA staff members were instructed by administrators, all of whom were political appointees, to set modest limits on mercury pollution and then to work backward from those limits to justify a regulatory proposal. Mercury is a toxic metal released as a byproduct by coal-burning power plants and other industries, and it is known to have a range of harmful health effects, especially on young children and pregnant women.

You and the Justice Department attorney assigned to the case have hired a mediator to assist you in sorting through the issues regarding the potential use of ADR for the case. The Justice Department attorney asked you to agree to this procedure following a deposition of your clients, in which they were superb. If you and the Justice Department attorney decide to use some ADR procedures, you will also consider how to choose a mediator and how to design an appropriate process. You may, or may not, ask the mediator to consider mediating the entire dispute following this convening conference.

You have had a brief telephone discussion with the mediator and the Justice Department attorney assigned to the case to give the mediator a brief overview of the case and schedule this conference. You are very interested in pursuing similar cases with other clients, seeing mercury poisoning as a potential hot spot for innovative tort litigation that is important to you as a strong environmentalist. You believe, however, that the Justice Department may be willing to settle this particular case early because of the severity of the damages to your very strong and attractive clients. You believe the government may see the case as a political landmine. You are particularly concerned that your case will involve difficult and controversial scientific evidence as well as testimony from an EPA staff member who resigned in protest when the mercury rules were issued.

You are interested in considering whether it is appropriate to include your scientific expert in the ADR process.

Your clients are, understandably, extremely emotionally distraught by what happened, and you may have difficulty convincing them to settle, particularly the husband who believes that his family's historical livelihood is threatened by mercury pollution and wants to launch a crusade around the issue. You believe that the case has strong jury appeal, given your clients and their loss; however, the scientific proof regarding causality is extremely complex and may not survive a motion for directed verdict. In addition, your clients' hospital bills are horrendous, and they desperately need money.

You are torn as to whether it is more important to mediate the case with a mediator who has highly developed relational skills to work with your clients or whether to seek an early neutral evaluation process with an experienced litigator or retired judge to educate your clients about the risks of proceeding with the case. If you decide to mediate rather than have an early neutral evaluation, you would like the mediation to come only after you have had an opportunity to develop your case in discovery. You believe that your case will only get stronger through discovery and that you may acquire information that will be valuable in future similar cases. Thus, your main reason for agreeing to a conference at this early stage is to use the conference to create an expedited discovery plan. You believe the government lawyers are giving settlement signals because they do not want you to have access to some potentially explosive information that could lead to a rash of similar lawsuits.

## ***“Convening” an ADR Process Demonstration Role Play Instructions***

### **Justice Department Attorney Role**

You are to act as defense attorney in a brief demonstration role play of an ADR convening conference. The purpose of the demonstration is to explore the advantages of giving serious attention to the process of “convening” and to help the audience appreciate the contributions that a neutral can make through a “convening conference.”

The case arises under the Federal Tort Claims Act, and you are in the civil division of the Justice Department. The plaintiffs are a young couple whose baby was born with serious birth defects and subsequently died. The husband has been a commercial fisherman all his life, having begun working at a young age with his father who was also a commercial fisherman. Both parents took extensive blood tests following the birth in an effort to determine what may have caused the birth defects. These tests showed extremely high levels of mercury in their blood. They allege that the US Environmental Protection Agency ignored scientific evidence and agency regulatory procedures and protocols in setting limits on mercury pollution that would line up with the Bush administration’s free-market approaches to power plant pollution.

Plaintiffs allege that EPA staff members were instructed by administrators, all of whom were political appointees, to set modest limits on mercury pollution and then to work backward from those limits to justify a regulatory proposal. Mercury is a toxic metal released as a byproduct by coal-burning power plants and other industries, and it is known to have a range of harmful health effects, especially on young children and pregnant women.

You have asked the plaintiffs’ attorney to consider an early ADR process for the case. You made this request soon after you deposed the plaintiffs. You were extremely impressed with them as potentially powerful witnesses with strong jury appeal. In addition, the damages could be very large because of the death of their baby and the fact that their mercury poisoning likely means they cannot safely have children. You were surprised that your superiors in the Justice Department responded quickly and positively to your memo alerting them to the danger of the case, even though the science is quite controversial. They instructed you to do everything reasonably possible to settle the case as quickly as possible. You surmise that this means there are some troubling documents that could surface during discovery and might lead to political problems for the Bush Administration and a rash of similar lawsuits.

You know from previous experience with the plaintiffs’ attorney that s/he is likely very interested in pursuing similar cases with other clients and, no doubt, sees mercury poisoning as a potential hot spot for innovative tort litigation. You and the plaintiffs’ attorney agreed to hire a mediator to assist in sorting through the issues regarding the potential use of ADR for the case. If you and the plaintiffs’ attorney decide to use some ADR procedures, you will also consider how to choose a mediator and how to design an

appropriate process. You also are interested in considering whether it is appropriate to include a scientific expert from EPA in the ADR process. You may, or may not, ask the mediator to consider mediating the case, following this convening conference. You have had a brief telephone discussion with the mediator and the plaintiffs' attorney to give the mediator a brief overview of the case and to schedule this conference.

You would like to see the case go through an early neutral evaluation that could educate and discourage the plaintiffs regarding the risks of trial and the shakiness of the underlying science. You are hopeful that if that happens, the case will settle. Your biggest concern, however, is to settle the case before discovery. You know that to please your superiors you must do everything possible to limit the discovery process, including asserting executive privilege and other evidentiary objections regarding the process the agency used to set the mercury levels.

## ***“Convening” an ADR Process Feedback Form***

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: \_\_\_\_\_

Tel. no.: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Location of the program: \_\_\_\_\_

1. How did you use the module? If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

2. How can we improve the module?

3. How can we improve the Program Guide?

4. Please suggest additional issues relating to convening an ADR process that we might add to this module?

5. Was the demonstration role play successful? Do you have any suggestions for improving the role play?

6. Please provide suggestions for future ADR program modules.

## ***Program E***

### ***Court-Connected ADR: Mandatory Voluntary?***

#### **Program Overview**

This program explores the considerations that should be taken into account when deciding whether to make participation in court ADR programs voluntary or mandatory.<sup>1</sup> Although the issue is often framed as an either/or question, a more accurate framing is: Where, on a continuum from absolutely mandatory (no escape possible) to purely voluntary, should the district's ADR processes (all or some of them) fall? In addition to the programmatic question of how mandatory or voluntary ADR should be within the district, the program organizers may want to address a related, but different, question: Whether a judge should exercise his or her power to order parties to go to ADR in a particular case?

This program provides a forum in which the district's judges, lawyers, clients, administrators and, perhaps, leaders in the dispute resolution field can address or revisit questions about the extent to which ADR programs and/or processes ought to be voluntary or mandatory, e.g., by examining various approaches to opting-in and to opting-out of ADR. In addition, the program addresses the variety of processes and criteria that decision-makers might use to determine whether parties in given cases may be relieved of the duty or required to participate in some form of ADR.

The program organizers have two options for presenting the program. The entire program may be devoted to a presentation, either by a group of panelists and/or expert(s) on court-connected ADR (Option One), or it may be divided between a panel discussion and/or expert's(s') presentation(s) and small discussion groups (Option Two). Instructions for both approaches are presented below.

#### **Program Objectives**

1. To raise and examine the major issues related to decisions about where ADR programs and processes should fall on the mandatory voluntary continuum
2. To provide the district's ADR program leaders with input from practitioners, judges and administrators in districts that are making or rethinking policy decisions related to mandatory voluntary ADR

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<sup>1</sup> The factors affecting mandatory voluntary policy decisions can change over time, for example in response to changes in the local legal culture related to ADR, ADR-related legislation (e.g., the ADR Act of 1998) or developments in the law of confidentiality or in rules or laws related to pretrial processes.

## **Instructions for the Program**

Program organizers have two options for presenting this program. Both options include panel presentations regarding the mandatory voluntary issue for court-connected ADR programs. Option Two adds small group discussions and therefore reduces the amount of time for the presentations. Program organizers should make the choice between the two options based on whether the district is interested in *giving the participants information* (Option One – no small group discussions) or *gathering input* from the participants (Option Two – shorter panel presentations plus small group discussions). If the district wants input, it is important to include small groups, because small groups generally ensure that more people will have an opportunity to speak and that the district will hear from those participants who are less comfortable speaking in a large group.

### **Option One – Presentations (without Small Group Discussions)**

1. **Introductory Comments (10 minutes):** The program opens with the moderator's presentation of an overview of the program and the program objectives. The moderator then introduces the panelists and gives introductory comments about the mandatory voluntary issue. If the purpose of the program is to consider the issue in the context of a pending decision about whether to mandate ADR, the moderator should make that clear and invite the audience to take advantage of the opportunity to provide input into the decision during the question and response period.

- a. ***Panel Presentations and Conversation or Presentation by an Expert (55 minutes):***

**Panel Presentation:** The panelists make 10-15 minute presentations, depending upon the number of panelists, leaving 10-15 minutes for the moderator to facilitate a conversation among the members of the panel regarding the major issues they see relating to the mandatory voluntary continuum. The Presenters' Guide (included at the end of this program module) and the list of articles (at the end of this program module) will be useful to panelists and program organizers to ensure that panelists cover in depth and detail the issues that are most significant to the district.

**or**

**Presentation by Expert or Experts:** Program organizers might choose to focus the program on a single recognized expert in court-connected ADR in addition to or instead of the panel presentation. They might choose, instead, to invite two experts with different perspectives on the topic, who could present in a point-counterpoint format. The expert's(s') presentation(s) should:

- Highlight major issues raised by the decisions related to mandatory voluntary ADR;
- Review the various perspectives on these issues; and
- Discuss the policy and practical considerations of the decision.

Again, program organizers will find it helpful to refer to the Presenters' Guide and bibliography to ensure that the expert(s) covers in depth and detail the issues that are most to the district.

2. **Large Group Questions and Panel and/or Expert Responses (20 minutes):**

Following the panelists' (or the expert's) presentations, the moderator invites the audience to ask questions. This period might be organized as follows:

- a. Moderator invites participants to direct questions to particular panelists and/or expert, or
- b. Volunteers collect written questions, which contain the name of the panelist and/or expert to whom the question is addressed, and distribute them to the moderator.
- c. Moderator then reads the questions and directs them to panelists and/or expert(s) who take turns answering the questions.

3. **Concluding Remarks (5 minutes):** The session could conclude as follows:

- a. Moderator sums up the salient points presented in the program, thanks the panelists and/or expert(s) and the participants and concludes by naming the fundamental themes the moderator has heard expressed during the program, or
- b. All panelists (and the expert[s]) offer a final 1-minute comment about what they learned from the other panelists and participants and state whether they are rethinking the positions they expressed at the beginning of the program.

**Option Two – Shorter Panel Presentations and Small Group Discussions**

1. **Opening Presentation (10 minutes):** Same as Option One, above.

2. **Panel Presentations and Conversation (25 minutes):** Same as Option One, except the time is shortened.

**or**

**Presentation by Expert or Experts:** Same as Option One, except the time is shortened. If program organizers choose to use Option Two with small group discussions and also include a presentation by an expert or experts, then it would not be appropriate also to have presentations from other panel members, unless the length of time for the entire program were extended from 90 to 120 minutes or the number of panelists is reduced and their role is limited to commenting on the expert's presentation.

As noted above, regardless of the time allowed, limiting the number of panelists to four (for Option One) and two or three (for Option Two) allows the maximum opportunity for the panelists to interact and provide meaningful input.

3. **Small Group Setup and Discussions (25 minutes):** Following the panel presentations and conversation or the expert's presentation (and panelists' brief comments, if any), the participants engage in small group discussions at their tables. Facilitators lead the conversations. Facilitators should be assigned one or two issues from the issues listed in the Presenters' Guide. The participants' perspectives, which the group scribes will report back to the large group, will provide the district's ADR program leaders with input and recommendations regarding local viewpoints on the mandatory voluntary issue.

- a. The moderator introduces the small group discussions by explaining the purpose of the discussions and giving the following instructions:
  - Select a scribe to record the gist of the group's discussion, as well as specific recommendations suggested.
  - Imagine the district court has convened your group as a committee to advise the district's ADR program regarding whether to mandate ADR.
- b. In its advisory capacity, your group should:
  - Discuss the issues your group members believe to be the most critical to their recommendations; and
  - Reach a conclusion about whether to mandate ADR (or any specific ADR processes) and determine the rationale for that decision.

Program organizers should provide adequate supplies for recording the small group discussions, ideally, easels with pads and markers or, at least, pads and pens for taking notes. Additionally, the moderator and/or facilitators should encourage individual participants to write down and hand in their comments so they can be reviewed, even if they are not incorporated into the group's report.

4. **Small Group Reports, Questions-Responses and/or Panelist (and Expert or Experts) Comments (25 minutes):**

Following the small group discussions, the moderator asks each scribe to report back, very briefly, to the large group by presenting a summary of the highlights of each table's discussion and conclusions regarding mandatory ADR. In the remaining time allotted, the moderator facilitates a comment period in which the panelists and/or expert(s) share their observations or reactions to the group reports.

5. **Concluding Remarks (5 minutes): Same as Option One, above.**

### **Time for the Program**

	<b>Option 1</b> Panel and/or Expert Presentation	<b>Option 2</b> Panel and/or Expert Presentation and Small Group Discussions
Introductory comments	10 minutes	10 minutes
Panel presentations & conversation	55 minutes	25 minutes
Small group setup & discussions		25 minutes
Large group questions & panel responses	20 minutes	
Small group reports & large group Q & R		25 minutes
Concluding remarks	<u>5 minutes</u>	<u>5 minutes</u>
<b>Total time</b>	<b>90 minutes</b>	<b>90 minutes</b>

### **Program Presenters**

1. **Moderator:** The program's success depends heavily on a strong moderator who has considerable expertise and experience in court-connected ADR and can introduce the topic and raise the critical issues. The moderator should have the following qualifications:

- A lawyer with significant experience in the court's ADR program; or
- Experience in the administration of court-connected ADR programs, either from within or outside the district, and extensive involvement in policy discussions and decisions regarding court-connected ADR.

The moderator's role includes the following:

- Introducing and concluding the program
- Facilitating conversation among the panel members following their presentations
- Facilitating questions from the participants and responses from the panel members
- Option Two only: Setting up and overseeing small group discussions and facilitating reports from the small groups (see Instructions for the Program, Option Two, below)

2. **Panelists/facilitators:** The panel members should all have experience with court-connected ADR, either as court administrative staff, lawyers, judges or neutrals. In addition, they should have the following qualifications:

- Are engaging speakers
- Have flexible presentation styles
- Are respected within the district



The panel might include:

- At least one lawyer
- At least one client or a local United States Attorney
- At least one district judge, magistrate judge or bankruptcy judge
- At least one ADR program leader from within the district or from a district that has made a decision about whether its program should be mandatory or voluntary

For Option One, the ideal number of panelists is four or fewer; for Option Two, two or three.

Program organizers should interview prospective panelists about their perspectives on the mandatory voluntary question to ensure the panelists present divergent points of view not only on the ultimate question, but also on the rationale behind their positions.

If program organizers choose Option Two, following their presentations, the moderator and panelists and/or expert(s) (see below) will also act as facilitators and join the participants to facilitate the small group discussions.

3. **Expert(s)** (optional): A program focused on an expert or experts will be more or less effective depending on the experts' credentials in the area of mandatory voluntary ADR policy and their ability to present an engaging and thoughtful program. In addition to being an outstanding speaker, the expert should have the following qualifications:

- Academic experience in the ADR field, including researching and writing about court-connected ADR; or
- Experience in the administration of court-connected ADR programs, either from within or outside the district, and extensive involvement in policy discussions and decisions regarding court-connected ADR.

Contact information for these individuals is located in Appendix B of this Program Guide under the heading "Experts in Court-Connected ADR."

### **Room Set-up and Seating**

The moderator and panel members sit on a dais or stage in order to be visible to participants. If Option One for the program is selected (see Instructions for the Program, Option One, below), the participants should be seated theatre style in rows.

If program organizers select Option Two, the participants should sit at round tables that seat 6-8. There should be one panel member to act as facilitator for each table. In larger districts, program organizers may need to recruit additional facilitators, if the number of tables exceeds the number of presenters. To work most effectively, organizers must plan

table seating at each table to ensure a sufficiently diverse representation of lawyers (plaintiff and defense), judges and court administrative personnel to create interesting and engaging small group conversation. Ideally, a table of 6-8 should seat a district judge, a magistrate judge and/or a bankruptcy judge, a defense lawyer, a plaintiff's lawyer and a member of the court staff. Organizers can pre-assign table seating and instruct participants where to sit as part of the registration or check-in process.

### **Written Materials**

1. Presenters' Guide

### **Resources**

#### **Publications**

1. Brazil, Wayne D., "Arguments for and against Mandatory Arbitration," 7 FJC Directions, Issue 14 (December 1994).
2. "Evaluation of the Early Mediation Pilot Programs," Judicial Council of California, Administrative Office of the Courts (2004). (Available on the web at [www.courtinfo.ca.gov/reference/documents/empprept.pdf](http://www.courtinfo.ca.gov/reference/documents/empprept.pdf).)
3. Mack, Kathy, *Court Referral to ADR: Criteria and Research*, for the National ADR Advisory Council and Australian Institute of Judicial Administration and National Dispute Resolution Advisory Council (2003). (See pp. 47-48 for a review of empirical research on the impact of compulsory versus voluntary participation.)
4. "Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts," Society for Professionals in Dispute Resolution (1991).
5. Menkel-Meadow, Carrie, "An Adversary Culture: A Tale Of Innovation Co-Opted or The Law of ADR," 19 Fla. St. U.L. Rev. 1 (1991).
6. Wissler, Roselle, "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research," 17 Ohio St. J. on Disp. Resol. 641 (2002).

***Court-Connected ADR: Mandatory Voluntary  
Presenters' Guide  
Issues Related to the Mandatory Voluntary Question***

The subject of mandatory voluntary ADR raises a multitude of issues too vast for the short program envisioned by this module to cover fully. Therefore, program planners should consider the relative importance of the potential issues and provide guidance to the panelists and/or expert(s) concerning the program's content and focus, taking into account local issues and concerns. In addition, if program planners decide to include small group discussions in the program (Option Two), this list of issues can be used to identify discussion topics. Below is a list of practical and theoretical issues related to question of mandatory voluntary ADR:

1. What is the purpose of the court's policy regarding ADR referrals or the ADR program? Policy considerations might differ from district to district and judge to judge. Is a primary purpose:
  - To reduce the caseload?
  - To help parties find a solution that will work better or be timelier than a determination by a judge or jury?
  - To provide parties the opportunity to select a dispute resolution process that will be best suited to their particular dispute?
  - To ensure the court's relevance in meeting the public's needs related to dispute resolution?
2. How is the mandatory voluntary decision affected by the individual case?
  - Are there categories of cases that are more politically sensitive and therefore should be exempt from mandatory ADR (as reflected, for example, in the exemption of civil rights cases from non-binding arbitration programs)?
  - Should cases in which the litigants have very limited resources or staying power be eliminated from mandatory ADR to make sure they are not effectively squeezed out of the 7th Amendment? Or are these perhaps the cases best suited to ADR, given the reduced ability of litigants with limited resources to make it all the way to trial?
  - Should *pro se* cases be eliminated from mandatory ADR?
3. Does the court have authority to make participation in ADR process "X" by parties with cases in category "Y" mandatory? What is the source of any such authority?
4. Does the court have authority to compel the Department of Justice or other federal agencies to participate in a given ADR process?
5. What about the timing of a requirement to participate in ADR? Does it make sense to require ADR only shortly before trial, if at all?
6. Who should raise the possibility of participation in ADR on behalf of the court? A district judge, a magistrate judge, other? Where? In an initial scheduling order? In a scheduling or status conference where counsel are present?

7. Are the neutrals paid or volunteers? If paid, by whom? For all or part of the ADR process? At a nominal fixed rate or average market fixed rate? At a fixed rate or the neutrals' normal market rate?
8. What about the use of magistrate judges as neutrals?
9. How do the factors of age, level of institutionalization and/or level of development of the ADR program affect the mandatory voluntary decision?
10. Is it fair and/or constitutional to force parties into ADR? How does the analysis change if the ADR process is free? Party-paid?
11. If the ADR process is mediation, could forcing mediation suppress the creativity essential for achieving outside-the-box resolutions?
12. Given that approaches to mediation vary greatly – from a settlement conference model, where the focus is on the mediator's evaluation of the likely outcome in litigation, to purely facilitative mediation, where parties determine the subject matter and the mediator directs the conversation in a positive direction – how is the analysis of whether and how to require participation in mediation affected by the particular kind of mediation that would be involved? And should the program allow parties to choose a particular kind of mediation?
13. Is the ADR process any more or less satisfying if parties have a choice about whether to participate?
14. Is the ADR process any more or less effective in achieving settlement if parties have a choice about whether to participate? Do cases that are voluntarily in ADR have a higher settlement rate?
15. How is the decision about whether the ADR program should mandate *attendance* in certain ADR processes influenced by the district's mandatory voluntary ADR policy?
16. How does the mandatory voluntary decision influence the number of cases that utilize ADR?
17. Do neutrals find it more satisfying to mediate cases in which parties appear voluntarily?
18. Does the analysis of any of these issues differ if they are considered in the context of the specific ADR processes of mediation, non-binding arbitration or early neutral evaluation?
19. What factors would cause parties to choose to opt out of voluntary ADR or insincerely go through the motions in mandatory ADR? Some factors might be:
  - A strategic decision to inundate and overwhelm an adversary via a scorched earth approach to litigation
  - A belief that the litigants must complete discovery before the case is ready for settlement
  - The expectation of better resolution terms on the eve of trial
  - The belief that settling a case in ADR will result in a shortfall in the lawyer's contingent or hourly fee
  - The plaintiff's belief that he or she has a strong case but very limited resources to pursue it, ironically producing an almost irrational insistence upon vindication at trial
20. Any additional questions the panelists think are relevant to the issue of whether the district should mandate ADR.

## ***Court-Connected ADR: Mandatory Voluntary Feedback Form***

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: \_\_\_\_\_

Tel. no.: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Location of the program: \_\_\_\_\_

1. How did you use the module? If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

2. How can we improve the module?

3. How can we improve the Program Guide?

4. What issues regarding the mandatory-voluntary nature of your district's court-connected ADR program might be added to the issues discussed in this program?

5. Did experts make presentations in your program? If you would recommend them for other districts, please provide their names and contact information.

6. Please suggest topics for future ADR program modules.

## ***Program F***

### ***Timing of Mediation in Civil Cases***

#### **Program Overview**

This program addresses mediation timing issues and the implications for litigants, attorneys and court personnel. The program addresses the question: “Is there a preferred time to hold a mediation during the course of litigating a case in U.S. District Court?”

The answer to this question is challenging for parties, the attorneys, the court administration and the judiciary. Parties face emotional, strategic and financial issues regarding the timing of mediation. Attorneys face complex strategic, ethical, discovery and case management issues. Court administrators face administrative, staffing and financial issues. District judges, magistrate judges and bankruptcy court judges face oversight and case management issues. These competing issues make determining the appropriate time to hold mediation quite difficult.

#### **Program Objectives**

1. To explore the issues involved in determining the appropriate timing for mediation in U.S. District Court
2. To learn the views of plaintiffs, defendants, court administrators, district judges, bankruptcy court and magistrate judges
3. To create a broad range of criteria by which to make this fundamental decision
4. To create a specific product – a list of criteria for making this determination, which will be compiled and reproduced as a document to be included in the court’s ADR packet of information and/or placed on the court’s website

#### **Time for the Program**

<b>Activity</b>	<b>Time</b>
Introductory comments	10 minutes
Set-up of small group discussion	5 minutes
Small group discussions	30 minutes
Small group reports	15 minutes
Comments	15 minutes
Questions and responses	10 minutes
Concluding remarks	5 minutes
<b>Total time</b>	<b>90 minutes</b>

#### **Program Presenters**

1. **Moderator:** The moderator should be closely connected with the district’s ADR program and understand the relevant issues and how settlement conferences fit into the district’s ADR program.

2. **Panelists/facilitators:** Program organizers should recruit knowledgeable, articulate and entertaining speakers, who might include the following:
  - Plaintiff's attorney
  - Defense attorney
  - Staff member from court administration – someone who knows the timing for mediation in the district
  - District judge, magistrate and/or bankruptcy judge
  - Neutral from the district's panels

### **Room Set-up and Seating**

The moderator and panelists/facilitators should sit on a dais or stage in order to be visible to participants. The participants will form small (4-5-person) discussion groups, so they should sit theater style in chairs they can move or sit at round tables that seat 8-10, so that they can easily move their chairs to form their small groups.

### **Instructions for the Program**

1. **Opening Presentation (10 minutes):** The moderator welcomes the participants and introduces the panelists or speaker and the topic by presenting an overview of the program objectives and agenda and highlighting the issues related to mediation timing from various perspectives, including those of the court.
2. **Set-up of Small Group Discussion (5 minutes):** The moderator instructs participants to form groups of 4-5 persons. The groups can be composed in various ways,<sup>1</sup> including the following:
  - a. Form diverse groups that, ideally, include a plaintiff's attorney, a defense attorney, someone from the court staff and/or a neutral in each group, district judge and/or magistrate and/or bankruptcy court judge
  - b. Allow participants to form random groups
  - c. The moderator structures the small group discussions. See "Timing of Mediation in Civil Cases: Participant Instructions for Small Group Discussions," included in this module as a handout for participants. Briefly, the instructions direct participants to:
    - Form groups of 4-5 (according to the program organizers' preference)
    - Select a scribe

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<sup>1</sup> If court ADR program staff is small, it may not be possible to include a staff member in every group, in which case program planners, in advance of the program, could ask ADR program advisory members or selected mediation panelists to represent the court's perspective in the small group discussions. At a minimum, the panel should include at least one staff member who is responsible for ADR and who represents the court's perspective regarding the benefits of mediation.

- Imagine the group is a sub-committee for the court administration assigned to analyze the cases and timing set forth in the “Timing Grid” (included in this module as a handout for participants)
- c. Brainstorm appropriate criteria by which to determine the timing for scheduling mediation, filling in criteria for each block in the Timing Grid
  - d. Following the discussion, report back to the large group on the group’s analysis and criteria
3. **Small Group Discussions (30 minutes):** Groups hold discussions consistent with the above instructions.
  4. **Small Group Reports (15 minutes):** Scribes for each group report to the large group the most significant issues, questions, concerns or learning from their respective discussions.
    - a. **Panelist Discussion (15 minutes):** Panel members respond to discussions, small group reports or “Timing of Mediation in Civil Cases: Relevant Issues” (included in this module as a handout for participants). Panel members should focus on analysis and criteria they believe to be most important in determining mediation timing issues. As much as possible, the panelists should engage in conversation with one another, instead of making formal presentations. If necessary to equalize the “air time,” the moderator may direct questions to individual panelists.
    - b. **Questions and Responses (10 minutes):** Moderator invites participants to ask particular panelists questions.
      - **Concluding Remarks (2 minutes):** The moderator thanks the panels and participants.

If the program organizers decide to do so, the moderator states that the organizers will compile the criteria generated by the groups and the panel members and the court will distribute it to the Bar as a handout to include in the court’s ADR program information packet or as a document to be published on the court’s website.

### **Written Materials**

1. Relevant Issues
2. Participant Instructions for Small Group Discussions
3. Timing of Mediation Criteria Grid

### **Possible Follow-up**

To make the most of this program, the moderator could request that the scribes hand in their respective lists. A volunteer could assemble the lists and the suggestions from the panelists and create a composite list for distribution to district conference participants, and/or a volunteer could write a newsletter or local bar magazine article summarizing the suggestions. Either of these approaches would increase the likelihood that program participants retain and apply what they learn. Alternatively, or in addition, the information could be posted on the court's website.

### **Resources**

#### **Articles**

1. "Dispute Resolution under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States," 9 Admin. L.J. Am. U. 1007, 1069-1075.
2. Fairbanks, George C. and Street, Iris C., "Timing Is Everything – The Appropriate Timing of Case Referrals to Mediation: A Comparative Study of Two Courts," James City County Court (York County, Virginia) (June 26, 2001).
3. Seitman, John M., "Timing of Mediation Is Just as Important as Picking of Neutral," Los Angeles Daily Journal, June 11, 2004.
4. Varma, Arup and Stallworth, Lamont E., "Participants' Satisfaction with EEO Mediation and the Issue of Legal Representation: An Empirical Inquiry.," 6 Empl. Rts. & Employ. Pol'y J. 387, 405 ( ). (See pp. 411-412 for discussion of the relationship between disputants' satisfaction with mediation and the appropriate timing for mediation.)
5. Wissler, Roselle, "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research," 17 Ohio St. J. on Disp. Resol. 641 (2002).

***Timing of Mediation in Civil Cases***  
***Relevant Issues***

1. How do parties' primary purposes or goals of mediation influence the decision regarding timing of mediation?
2. While settlement often will be the primary purpose, sometimes other purposes are significant, and settling the case at the mediation can be a secondary objective.
3. Pressing parties to consider this question can encourage them to appreciate that mediation can have many purposes and can be used to achieve a number of ends.
4. It also can encourage lawyers and parties to develop intermediate objectives for at least an initial mediation, for example:
  - Developing a cost-effective plan to conduct the core discovery necessary to position parties to make reasoned settlement decisions
  - Clearing some emotional air
  - Laying necessary trust foundations that will support detailed negotiations at a later date
5. What interests of the litigants, plaintiffs' attorneys, defense attorneys, administrative personnel and the judiciary might be served in scheduling mediation during the following stages of the litigation process?
  - Before discovery and motions?
  - After focused discovery and motions essential to negotiations?
  - After percipient discovery but before expert discovery?
  - Immediately after close of all discovery?
  - Just before final pretrial conference?
6. What interests of the litigants, plaintiffs' attorneys, defense attorneys, administrative personnel and the judiciary might be frustrated in scheduling mediation during the following stages of the litigation process?
  - Before discovery and motions?
  - After focused discovery and motions essential to negotiations?
  - After percipient discovery but before expert discovery?
  - Immediately after close of all discovery?
  - Just before final pretrial conference?
7. What is the relationship between the cost of litigation and the timing of mediation? Are the following assumptions about this relationship accurate?
  - Cost and fees already suffered wear people down and make them more economically rational as time passes.
  - If you have an economically rational actor at the outset, an early mediation is appropriate; if you have an economically irrational actor, it is better to mediate later, after the reality of the cost of litigation has set in.
8. What is the relationship between the passage of time and the litigants' (and lawyers') readiness to mediate? Is it true that in some cases it is imperative that time must pass before settlement is possible (independent of the cost of litigation)?
9. What should a court consider in determining policy about the timing of mediation?
10. Should different criteria apply, depending upon the type of case and, if so, what should the criteria be?

11. Who should determine which criteria have priority in scheduling a particular mediation?
12. If the litigants believe mediation may be appropriate late in the case, rather than early, what avenues are available to them for moving the case most quickly and efficiently to mediation?
  - An early neutral evaluation, or early mediation, in districts in which it is available, as an inexpensive way to create a discovery plan, evaluate the case and prepare for a second mediation focused on settlement
  - A limited-purpose “case management” meeting with the mediator to determine what needs to occur before the case is ready for mediation and to develop a plan to accomplish the necessary tasks or information exchange to enable mediation to occur as early as possible
  - Planning for a series of two (or more) mediations – one fairly early to identify what really separates parties and to develop a surgical case development plan that focuses on the case-specific sources of those separations, then a second mediation in which parties are well positioned to take a hard run at settlement

***Timing of Mediation in Civil Cases***  
***Participant Instructions for Small Group Discussions***

1. Once the group comes together, select a scribe who is willing to take notes and report back to the large group.
2. Using the Timing Grid, consider the case examples and the litigation stages to analyze the issues involved and the appropriate criteria to determine the timing for scheduling mediation.
3. Regardless of the composition of your group, do your best to analyze the issues from the points of view of litigants, parties, plaintiff and defense attorneys and court personnel.
4. To assist with the brainstorming process, consider the following questions:
  - What are the underlying interests of the litigants, plaintiffs' attorneys, defense attorneys, administrative personnel and the judiciary in scheduling mediation during each stage of the litigation process?
  - What are the strategic issues raised for plaintiff and defense attorneys?
  - What are the ethical issues raised for plaintiff and defense attorneys?
  - What communication issues between attorneys and clients and between attorneys are raised by the various situations?
  - What are the case management issues raised for attorneys and court personnel?
  - Are different criteria relevant depending upon the type of case?
  - Who should determine which criteria have priority in scheduling a particular mediation?
  - How should the various criteria be determined and applied in specific cases?
5. Each group's scribe takes notes in preparation for reporting the group's ideas to the large group, preferably writing the report on poster paper, if provided, so other participants can see and hear the group's analysis and suggested criteria.
6. The scribe submits notes (or the poster paper) on the group's work to the program organizers for use in compiling a document with criteria for making a mediation timing decision, which the court may include in its ADR packet of information or post on the its website.

***Timing of Mediation in Civil Cases***  
***Criteria Grid***

	<b>Before Discovery/ Motions</b>	<b>After focused discovery/ motions Essential to negotiation</b>	<b>After percipient discovery but before focused discovery/ motions</b>	<b>After discovery and rulings on substantive motions</b>	<b>Just before final pretrial conference</b>
<b>Complex business case</b>					
<b>Standard personal injury case</b>					
<b>Federal tort claim with government as a party</b>					
<b>Civil rights case</b>					
<b>Intellectual property</b>					
<b>Pro se litigants, including prisoner cases</b>					
<b>Labor and non-civil rights employment case, including ERISA claims</b>					
<b>Other types of cases common in the district and amenable to mediation</b>					

## ***Timing of Mediation in Civil Cases Feedback Form***

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: \_\_\_\_\_

Tel. no.: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Location of the program: \_\_\_\_\_

1. How did you use the module? If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

2. How can we improve the module?
3. How can we improve the Program Guide?
4. Can you suggest additions to our list of issues related to timing of mediation in civil cases?
5. Are there additional examples of misguided settlement conference behaviors by judges or lawyers that we might include in this module?
6. Please suggest topics for future ADR program modules.

***Program G***  
***What Settlement Judges Want Lawyers to Know and What  
Lawyers Want Settlement Judges to Know<sup>1</sup>***

**Program Overview**

This program consists of three parts:

1. A lively panel discussion among lawyers, clients and judges from within the district *or* a humorous skit comprised of a series of live or videotaped vignettes involving the panelists that captures the participants' attention and raises 5-10 issues (see Small Group Discussions, below);
2. Small group discussions among 6-8 participants, guided by a discussion leader; and
3. Reports from the discussion groups followed by a brief large group discussion.

**Program Objectives**

1. For lawyers, clients and judges to exchange ideas and advice about settlement conferences in order to enhance the quality of practice within the district
2. To explore from the settlement judges' perspective what constitutes effective lawyer representation at settlement conferences, including the following:
  - Common errors lawyers make while representing clients in settlement conferences
  - How to prepare the judge effectively
  - The role of the client
  - Approaches to negotiating that lead to better outcomes
  - How open to be with the judge concerning information about the client's negotiating position
  - Other issues that the panelists believe relevant and useful to educating lawyers about what judges need
3. To explore from lawyers' and clients' perspectives what constitutes an effective settlement conference, including the following:

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<sup>1</sup> At the outset, it is important for program organizers (and panelists and participants) to define "settlement conference" and distinguish it from "mediation" by drawing a clear distinction between the two. As used in this program (and more generally in this Program Guide) a settlement conference is a proceeding conducted informally by a judge in the context of a litigated case, in which the primary goal is settlement of the case. The judge takes an active role to guide parties to resolution. The judge typically focuses on the law and lawyers, rather than parties, and provides an assessment of the settlement value of the case and the likely outcome if the case goes forward. See Appendix B for additional information about settlement conferences.

- Common errors judges make while hosting settlement conferences
- Access to settlement conferences
- Timing of the settlement conference
- The influence, positive or negative, of a judge's personal qualities and judicial temperament on the settlement conference process and outcome
- Tools, techniques and approaches that maximize the prospects for reaching settlement

### **Time for the Program**

<b>Activity</b>	<b>Time</b>
Introductory comments	8 minutes
Conversation among panelists or dramatization/skit	20 minutes
Small group discussions	35 minutes
Small group reports	15 minutes
Questions and responses	10 minutes
Concluding remarks	2 minutes
<b>Total time</b>	<b>90 minutes</b>

### **Program Presenters**

1. **Moderator:** The moderator should be closely connected with the district's ADR program and understand the relevant issues and how settlement conferences fit into the district's ADR program.
2. **Panelists/Actors:** Lawyers, clients and judges from within the district – who have extensive experience with settlement conferences and can speak honestly and directly about the issues in a constructive way – will serve as panelists and/or as actors in the skit. Ideally, the panelists should be open to rethinking their approaches to ADR, effective in stimulating active audience participation and clear in responding to the audience's suggestions and views. The panelists may also serve as discussion leaders (see "Discussion Leaders," the following section). The panelists and/or actors should include 6 to 7 individuals from the following categories:
  - Plaintiff's attorney
  - Defense attorney
  - "Representative" clients – an individual person who has participated in settlement conference (e.g., a plaintiff in employment litigation) and a representative of a corporate or government entity who has participated on the defense side, perhaps in multiple settlement conferences
  - District judge, magistrate judge and/or bankruptcy judge

Program organizers should instruct the panelists that the panelists should engage in conversation with the audience and one another, rather than making formal presentations, and that they should raise challenging issues in their conversation in order to provide a model for the small group discussions that will follow. Program

organizers should provide panelists with citations to the reading materials and the written materials that are part of this program module to facilitate their preparation.

3. **Discussion Leaders:** In the small group discussions, each table should have a discussion leader, who begins the conversation, guides it and, if necessary, encourages it by raising issues. Discussion leaders can be the same judges and lawyers who participated in the panel discussion. In larger districts, program organizers may need to recruit additional lawyers and judges to be discussion leaders to ensure there is a leader at each table.

**Room Set-up and Seating:** The panelists and moderator should sit on a dais or stage in order to be visible to participants. Participants should sit at round tables that seat 6-8. To work most effectively, table seating must be organized to ensure the sufficiently diverse representation of lawyers, clients (if possible) and judges to create interesting discussion. Ideally, a table of 6-8 should seat a district judge, a magistrate judge and/or a bankruptcy judge, a defense lawyer or a plaintiff's lawyer and two clients. Organizers can pre-assign table seating and instruct participants where to sit as part of the registration check-in process.

### **Instructions for the Program**

1. **Opening Presentation (8 minutes):** The moderator welcomes the participants and introduces the panelists and the topic by presenting an overview of the program objectives and agenda.
2. **Conversation among the Panelists *or* Dramatization/Skit (20 minutes)**

***Conversation among panelists:*** Panelists engage in conversation, rather than addressing the issues in formal presentations. The moderator prompts the panelists' conversation by asking questions along these lines:

- Judges, what advice do you have for lawyers that, if followed, could improve the outcome and quality of the experience of parties in settlement conferences?
- Lawyers, what advice do you have for judges?
- Clients, what advice do you have for both judges and lawyers?

The moderator directs questions in a way that ensures equal participation of all the panelists and does not allow any panelist to dominate the conversation.

***Dramatization or skit:*** A dramatization of a settlement conference that highlights and exaggerates bad practices is guaranteed to liven up the program. It could be a carefully crafted skit of a single settlement conference or a series of vignettes, followed by brief comments from the panelist "actors" about both the bad practices and the behavior that would have been more effective.

A second option is to allocate time for the actors to portray both good and bad practices. Following the skit, the actor panelists could comment, or a moderator could invite questions from the audience and the moderator and the actors could respond.

In either case, the program organizers must provide structure to the skit by identifying the subject practices and scripting the skit or providing instructions so the “actors” can script it. Included in the written materials at the end of this program module are two documents that will be useful in planning the dramatization: “Some Misguided Lawyer Behaviors” and “Some Misguided Judge Behaviors.” The dramatization/skit requires at least one rehearsal to confirm that sufficient content can be conveyed in the limited time allocated for the program. The dramatization/skit might also be videotaped, edited and shown to the participants, as an alternative to ensure quality and multiple use of the skit.

3. **Small Group Discussions (35 minutes):** The purpose of the small groups is to increase audience participation by structuring a small group exploration of ways judges and lawyers can improve the likelihood that parties will resolve their disputes at a settlement conference.

**Set-up (5 minutes):** The moderator explains that the small group discussions are an opportunity for the participants to explore how judges and lawyers can improve their understanding of how better to serve clients in settlement conferences. The moderator also urges the participants to add to, rather than repeat, what was said in the panel presentation.

The moderator instructs the discussion leaders, if not already seated at the round tables, to join their groups and asks the participants to think about the following questions:

- If you are a judge: What advice would you give lawyers who appear before you in settlement conferences?
  - If you are a lawyer: What advice would you give judges who conduct settlement conferences?
  - If you are neither a judge nor a lawyer: What advice would you give lawyers in helping their clients understand the settlement conference? Or, what advice would you give lawyers and judges in maintaining client satisfaction with the judicial process as a high objective during the settlement conference?
4. **Discussions (30 minutes):** The discussion leader at each table appoints a scribe to take notes and report back to the large group the small group’s advice. The participants should divide time equally between discussions about lawyers and judges, making certain to discuss clients’ perspective, even if a client is not a participant. Judges can use this opportunity to give advice to lawyers. Lawyers and

clients can give advice to judges based on their own experience, as well as concepts they have learned from others. Court staff can offer insights from anecdotal complaints or stories. If the discussion lags, discussion leaders can prompt conversation by raising the following issues:

### **Judges**

- How to make the most of the mediator/settlement judge
- Effective settlement conference statements
- Effective use of the client
- What judges expect from lawyers regarding settlement negotiations at the settlement conference
- How and under what circumstances to use motion practice to position a case for productive settlement discussions (i.e., using motions to create the most promising context for settlement negotiations)
- How during a settlement conference to use either existing rulings on motions in the case or the prospect of filing motions which address specifically identified issues to advance the negotiation ball
- Preparing your settlement conference and negotiation strategy and making certain that your client understands and has agreed to your proposed approach
- Dealing with the aggressive “arm twisting” judge, who makes explicit or implicit threats regarding the trial to obtain a settlement

### **Lawyers**

- How pre-settlement conference communications between the judge and the lawyers (and perhaps the parties) might improve the prospects of settlement by assuring that the parties and the judge are optimally prepared for the conference
- How to help lawyers see the other side’s perspective on the case in a way that enhances settlement opportunities
- What rulings lawyers need on motions in order to enhance the prospects for settlement
- How to help lawyers talk with their clients about settlement

### **Both**

- Tools each group wished the others employed
- What works and why
- Do’s and don’ts
- Maintaining client satisfaction with the judicial process and promoting respect for the judicial institutions as high priorities during the settlement conference

5. **Small Group Reports (15 minutes):** If the panelists/actors have served as discussion leaders, they return to the dais. The moderator leads the reports by calling on the scribes for each group. Scribes stand at their tables and read their respective lists of advice for lawyers and for judges. If there are only a few tables, the moderator may choose to write the suggestions on a whiteboard or an easel pad. For programs with more than four tables, the moderator may ask the scribes to submit their lists, so that

the program organizers will have the option of collecting the information for future use.

6. **Questions and Responses (10 minutes):** The moderator invites the participants to ask any final questions and directs them to the most appropriate panelists.
7. **Concluding Remarks (2 minutes):** The moderator thanks the panelists/actors, discussion leaders, and participants, and concludes with a succinct statement of what he/she believes to have been the value of the program.

### **Written Materials**

1. Instructions for Discussion Leaders
2. Possible Misguided Judge Behaviors
3. Possible Misguided Lawyer Behaviors

**Possible Follow-up:** To make the most of this program, the moderator could request that the scribes hand in their respective lists. A volunteer could assemble the lists and the suggestions from the panelists and create a composite list of suggestions for distribution to district conference participants, and/or a volunteer could write a newsletter or local bar magazine article summarizing the suggestions. Either of these approaches would increase the likelihood that program participants retain and apply what they learn. Alternatively, a volunteer could turn the suggestions into a document to be sent to all judges and to lawyers along with the notice setting a settlement conference, and/or the information could be posted on the court's website.

### **Resources**

#### **Articles**

1. Brazil, Wayne D. "A Judge's Perspective on Lawyering and ADR," 19 Alternatives 4 (January 2001).
2. Brazil, Wayne D. *Effective Approaches to Settlement: A Handbook for Lawyers and Judges*. (Clifton, N.J.: Prentice Hall, 1988).
3. Brazil, Wayne D., "Effective Lawyering in Judicially Hosted Settlement Conferences," 1988 Journal of Dispute Resolution 1 (1987).
4. Brazil, Wayne, D. "For Judges: Suggestions about What to Say About ADR at Case Management Conferences--and How to Respond to Concerns or Objections Raised by Counsel," 16 Ohio St. J. on Disp. Resol. 165 (2000).
5. Brazil, Wayne D. "Hosting Settlement Conferences: Effectiveness in the Judicial Role," 3 Ohio State J. Dispute Resolution 1 (1987).
6. Brazil, Wayne D. "Negotiating in the Shadow of a Settlement Judge: Some Misguided Behaviors by Lawyer-Negotiators," forthcoming in *The Negotiator's Fieldbook*, Eds. Christopher Honeyman and Andrea Schneider. Washington, D.C.: American Bar Association Books, late 2005.

7. Brazil, Wayne D. “What Lawyers Want from Judges in the Settlement Arena,” 106 F.R.D. 85 (1985).
8. Gochros, Susan Pang. “Settlement Conferences: The Good, the Bad, and, the Ugly,” Hawaii Bar Journal, November 2003.
9. Trial Courts of Arizona Maricopa County, *Civil Settlement Conference Training Manual*. December 2004. (An electronic copy is available at <http://www.superiorcourt.maricopa.gov/adr/>. Click on Judges Pro Tempore link.)

**Cross-reference:** Please refer to the program module ADR: A Dialogue between Judges and Lawyers for additional ideas or resources related to this program.

## ***What Settlement Judges Want Lawyers to Know and What Lawyers Want Settlement Judges to Know***

### ***Instructions for Discussion Leaders***

- 1. Appoint a scribe** to take notes and report back to the large group the small group's advice.
- 2. Divide time** equally between discussions about lawyers and judges.
- 3. Make certain to discuss the clients' perspective**, even if a client is not a member of the group.
- 4. Get the discussion going:**
  - a. Judges use this opportunity to give advice to lawyers. Lawyers and clients give advice to judges from their experience, as well as concepts they have learned from others. Court staff can offer insights from anecdotal complaints or stories.
  - b. Use the written materials, which are included at the end of this module, to prompt the discussion: "Possible Misguided Lawyer Behaviors" and "Possible Misguided Judge Behaviors".
  - c. If the discussion lags, discussion leaders can prompt conversation by raising the following issues:

#### **Judges**

- How to make the most of the mediator/settlement judge
- Effective settlement conference statements
- Effective use of the client
- What judges expect from lawyers regarding settlement negotiations at the settlement conference
- How and under what circumstances to use motion practice to position a case for productive settlement discussions (i.e., using motions to create the most promising context for settlement negotiations)
- How to use either existing rulings on motions or the prospect of filing motions that address specifically identified issues to advance the negotiation ball during a settlement conference
- Preparing your settlement conference and negotiation strategy and making certain that your client understands and has agreed to your proposed approach
- Dealing with the aggressive "arm twisting" judge, who makes explicit or implicit threats regarding the trial to obtain a settlement

**Lawyers**

- How pre-settlement conference discussions with the other counsel and/or with the judge about how to prepare for the settlement conference can enhance the prospects for settlement
- How to help lawyers see the other side's perspective on the case in a way that enhances settlement opportunities
- What rulings lawyers need on motions in order enhance the prospects for settlement
- How to help lawyers talk with their clients about settlement

**Clients**

- Identify various judge and lawyer behaviors in preparing for, or presiding over, settlement conferences and discuss the effects (positive or negative) these behaviors have on the course and vitality of negotiations, on the prospects for achieving settlement, and on the client's feelings towards or opinions about the judiciary and our system of justice.
- Consult the written materials, which are included at the end of this module, of possible judge and lawyer behaviors.

**Lawyers, clients and judges**

- Tools each group wished the others had/used
- What works and why?
- Do's and don'ts

## ***What Settlement Judges Want Lawyers to Know and What Lawyers Want Settlement Judges to Know***

### **Possible Misguided Lawyer Behaviors**

1. Inadequately researching the law
2. Failing to be fully conversant with the facts relevant to settlement
3. Neglecting to prepare the client for participation in the settlement conference
4. Failing to prepare the client adequately for the role your settlement judge will expect your client to play. There are various roles clients can effectively play in the settlement conference, and the client's role can vary judge-to-judge, client-to-client and case-to-case. It is a mistake to assume all settlement conference judges treat clients the same or expect clients to play the same role. Lawyers should:
  - Be prepared for different roles and formats
  - Prepare the client to be flexible
  - Find out what your judge is like, or what the patterns in this court are, and then prepare your client so that he/she can participate effectively.
5. Forgetting to consider and discuss creative options with the client in preparation for the settlement conference
6. Neglecting to plan adequately for the money negotiation by creating a negotiation strategy and getting your client's agreement to that strategy
7. Failing to bring the client, or failing to bring the client representative with adequate authority to settle the case
8. When it is impossible to bring a client with adequate authority, neglecting to inform the court and opposing counsel and neglecting to make appropriate arrangements to communicate with additional client or carrier representatives to obtain increased authority during the settlement conference, if necessary
9. Failing to be available or make sure the client is available for the time required to reach agreement
10. Perfunctory, incomplete, unnecessarily inflammatory or poorly written settlement conference statements
11. Refusing to be in the same room with the other party or lawyer
12. Opening with an offer/demand that is too close to your bottom line, and thereby not leaving room to negotiate appropriately with the opposing party
13. Opening with an obviously implausible or extreme position – undermining your credibility with the judge and the opposing party
14. Overvaluing the case or overselling it to the client
15. Giving the judge a bottom line too early in the process or refusing to give the judge a bottom line late in the process, thereby robbing you of necessary negotiation flexibility
16. Lying about the bottom line
17. Not recognizing that you can say things so you do not have to lie
18. Not recognizing that you can find ways of resisting movement without lying
19. Obvious lies are a grievous error
20. Giving ultimatums does not work and causes you to lose credibility

21. Insulting or impugning the character or ability of the other lawyer or client in joint session
22. Giving the settlement judge information that strengthens your client's case – crucial information about the strength of your client's case and weaknesses of the other side – but telling the judge to keep the information confidential from the other side
23. Giving the judge your closing argument in private session
24. Over-confidence/bravado, or otherwise projecting the impression that you think you have nothing to learn (even from the judge)
25. Analytical inflexibility – apparent closed-mindedness
26. Unwillingness to acknowledge anything positive about your opponent's case
27. Letting the settlement judge learn first from your opponent about the weaker aspects of your case (at least those that your opponent is likely to have figured out)
28. Bullying or threatening an opponent – or expecting the judge to do so
29. Appearing to be (or being) defensive and rigid
30. Appearing to be preoccupied with tactical maneuvering/gaming
31. Appearing to be almost wholly reactive (rather than grounded in the merits of your case) in the positions you take or the numbers you offer
32. Appearing to the settlement judge to elevate your interests (as counsel) over the interests of your client – or to permit your interests (e.g., in money or your politics or values or positions in other cases) to infect your judgment about what is in your client's best interests
33. Ego-blurring with your client, or identifying too emotionally with your client or his/her cause
34. Nickel and dime negotiating
35. Failure to anticipate the assumptions about your client's negotiation position the judge might make based on your statements to the judge early in the settlement conference about your client's settlement position
36. Adding, seriatim, new elements or conditions to an offer or demand that has already been the subject of substantial, or even successful, negotiations

## ***What Settlement Judges Want Lawyers to Know and What Lawyers Want Settlement Judges to Know***

### **Possible Misguided Judge Behaviors**

1. Failing to read the settlement conference statements carefully
2. Including or excluding clients, without considering the particular case fully
3. Requiring or failing to require client participation, without considering the particular case fully
4. Failing to explain to the client and counsel how you will structure or organize the conference and what roles you anticipate each participant will play
5. Failing to explain the confidentiality rules
6. Failing to identify clearly which communications and/or documents the parties or the lawyers want kept secret
7. Disclosing one party's secrets to the other party
8. Failing to explain the reasoning that supports or underlies the opinions you offer or the suggestions or proposals you make
9. Neglecting or focusing entirely on clients, rather than lawyers, or on lawyers rather than clients
10. Ignoring the human element or the experience and feelings of clients
11. Applying inappropriate pressure or failing to apply appropriate pressure to lawyers or clients in order to achieve a settlement
12. Holding or eliminating sessions in which all lawyers and clients participate, without considering the particular case fully
13. Declaring or failing to declare a settlement value for the case – in joint or separate session – without considering the timing and negotiation progress made in the conference
14. Predicting or failing to predict an outcome if the case does not settle – without considering the timing and negotiation progress made in the conference
15. Presiding over the settlement conference in a case in which the judge will also preside at trial, especially when the judge does so in a heavy handed manner resulting in counsel's likely feeling subtle (or not so subtle) pressure to settle out of concern for what the judge will do during the trial if the case does not settle
16. Scheduling insufficient time for the conference
17. Adjourning prematurely, before parties know what settlement is possible, or at least what the range of difference is between their respective positions
18. Keeping participants after they indicate there is no hope of settlement
19. Jumping too quickly to the numbers
20. Embarrassing the lawyer in presence of her/his client
21. Invading the attorney-client relationship – usurping the lawyer's role of the client's "advisor" in an inappropriate way

***What Settlement Judges Want Lawyers to Know and What Lawyers  
Want Settlement Judges to Know  
Feedback Form***

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: \_\_\_\_\_

Tel. no.: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Location of the program: \_\_\_\_\_

1. How did you use the module? If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

2. How can we improve the module?

3. How can we improve the Program Guide?

4. If a skit was part of your program, please evaluate its effectiveness in raising issues constructively and engaging participants?

5. Are there additional examples of misguided settlement conference behaviors by judges or lawyers that we might include in this module?

6. Please suggest topics for future ADR program module.

# APPENDIX

## *Overview of ADR Processes<sup>1</sup>*

Although the processes that constitute the universe of ADR are theoretically unlimited, the program modules in this Program Guide focus on some or all of the following four basic processes: mediation, early neutral evaluation, non-binding arbitration and settlement conferences. Below is a description of each:

### **I. Mediation**

#### **Goal:**

The goal of mediation is to reach a mutually satisfactory agreement resolving all or part of the dispute by carefully exploring not only the relevant evidence and law, but also parties' underlying interests, needs, priorities and feelings.

#### **Process:**

Mediation is an informal, flexible, non-binding and confidential process in which a neutral mediator facilitates settlement negotiations. Neither the mediator nor the participants may disclose mediation communications to the judge or to outsiders. The mediation session typically begins with presentations of each side's view of the case, through counsel or clients. The mediator, who may meet with parties in joint and separate sessions, works to:

- Improve communication across party lines;
- Help parties clarify and communicate their interests and understand those of their opponent;
- Explore the strengths and weaknesses of each party's legal positions; and
- Identify areas of agreement and help generate options for a mutually agreeable resolution.

Parties can determine the kind of role they want their mediator to play. That role could range from purely facilitative to more analytically assertive. Unless asked to do so, however, the mediator generally does not give an overall evaluation of the case. Mediation can extend beyond traditional settlement discussion to broaden the range of resolution options, often by exploring litigants' needs and interests that may be independent of the legal issues in controversy.

#### **Preservation of right to trial:**

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<sup>1</sup> The following descriptions are taken in large part from the website of the United States District Court, Northern District of California, which may be found at: <http://www.adr.cand.uscourts.gov/adr/adrdocs%20nsf/354c0e78f4dde1a6882564e1000be228?OpenView>.

The mediator has no power to impose settlement and does not attempt to pressure a party to accept any proposed terms. Parties' discovery, disclosure and motion practice rights are fully preserved. Parties may agree to a binding settlement. If no settlement is reached, the case remains on the litigation track.

**The neutral:**

Most courts impose minimum qualifications on any court-connected mediators. For example, the Northern District of California requires the following:

- Admission to the practice of law for at least 7 years (if a lawyer);
- Experience in communication and negotiation techniques;
- Knowledge about civil litigation in federal court; and
- Training by the court.

Some court mediation panels also include non-lawyer mediators, who would serve in any given case with the consent of parties. Non-lawyer mediators generally have special process skills or subject matter expertise, e.g., in real estate, securities or some highly technical intellectual property cases.

**Written submissions:**

Counsel usually exchange and submit written statements to the mediator before the mediation. The mediator may request or accept additional confidential statements that are not shared with the other side. Mediation statements are not filed with the court.

**Appropriate cases/circumstances:**

Almost any case might benefit from mediation. Cases with the following characteristics may be particularly appropriate:

- Parties desire a business-driven or other creative solution
- Parties may benefit from a continuing business or personal relationship
- Multiple parties are involved
- Equitable relief is sought, and parties, with the aid of a neutral, might be able to agree on the terms of an injunction or consent decree
- Communication appears to be a major barrier to resolving or advancing the case
- Strong emotions are or may be at play

**II. Early Neutral Evaluation****Goal:**

The goals of Early Neutral Evaluation (ENE) are to:

- Enhance direct communication between parties about their claims and supporting evidence
- Provide a confidential assessment of the merits of the case by a neutral expert
- Provide a "reality check" for clients and lawyers
- Identify and clarify the central issues in dispute and assist with discovery and motion planning or with informal exchange of key information
- Facilitate settlement discussions, when requested by parties

ENE aims to position the case for a more efficient resolution, whether by settlement, dispositive motion or trial. It may serve as a cost-effective substitute for some formal discovery and pretrial motions. Although settlement is not the immediate goal of early neutral evaluation, the process can lead to settlement.

**Process:**

The evaluator, an experienced attorney with expertise in the case's subject matter, hosts an informal and confidential meeting of clients and counsel at which the following occurs:

1. Each side – through counsel, clients or witnesses – presents informally the evidence and arguments supporting its principal claims and defenses (without regard to the rules of evidence and without direct or cross-examination of witnesses). The early neutral evaluation provides parties a forum where they can examine the lawsuit from the other, as well as their own, perspective.
2. The evaluator identifies areas of agreement, clarifies and focuses the issues and encourages parties to enter procedural and substantive stipulations.
3. The evaluator writes an evaluation in private that includes:
  - An estimate, where feasible, of the likelihood of liability and the dollar range of damages;
  - An assessment of the relative strengths and weaknesses of each party's case; and
  - The reasoning that supports these assessments.
4. The evaluator offers to present the evaluation to parties, who may then ask either to hear the evaluation (which must be presented if any party requests it), or postpone hearing the evaluation in order to:
  - Engage in settlement discussions facilitated by the evaluator, often in separate meetings with each side, or
  - Conduct focused discovery and/or make additional disclosures.
5. If settlement discussions do not occur or do not resolve the case, the evaluator may:
  - Help parties devise a plan for sharing additional information and/or conducting the key discovery that will expeditiously equip them to enter meaningful settlement discussions or position the case for resolution by motion or trial
  - Help parties realistically assess litigation costs
  - Determine whether some form of follow-up to the session would contribute to case development or prospects for settlement

**Preservation of right to trial:**

The evaluator has no power to impose settlement and does not attempt to pressure a party to accept any proposed terms. Parties' formal discovery, disclosure and motion practice rights are fully preserved. The evaluator's confidential evaluation is non-binding and is not disclosed to the trial judge. Parties may agree to a binding settlement. If no settlement is reached, the case remains on the litigation track.

**The neutral:**

To be effective, evaluators must have expertise in the substantive legal area of the lawsuit. Most courts impose minimum qualifications on any court-connected ENE evaluator. For example, the Northern District of California requires the following:

- Admission to the practice of law for at least 15 years;
- Experience with civil litigation in federal court;
- Expertise in the substantive law of the case
- Training by the court.

**Written submissions:**

Counsel generally exchange and submit written statements to the evaluator before the early neutral evaluation session. The confidential statements are not filed with the court.

**Appropriate cases/circumstances:**

Cases with the following characteristics may be particularly appropriate for early neutral evaluation:

- The parties have pled many different claims or defenses, and it is not clear to the other party which claims are most significant.
- The analysis on which outcome is likely to turn is complicated or subtle, and one or more of the parties could benefit from a neutral analysis.
- Counsel or parties are far apart on their view of the facts or the law and/or the value of the case
- The case involves technical or specialized subject matter – and it is important to have a neutral with expertise in that subject
- Case planning assistance would be useful
- Communication across party lines (about merits or procedure) could be improved
- Equitable relief is sought – if parties, with the aid of a neutral expert, might be able to agree on the terms of an injunction or consent decree

### **III. Non-binding Arbitration**

**Goal:**

The purpose of court-sponsored non-binding arbitration is to provide parties with access to a non-binding adjudicative disposition that is earlier, faster, less formal and less expensive than trial. The award (a proposed judgment) in a non-binding arbitration may either:

- Become the judgment in the case if all parties accept it, or
- Help inform parties' settlement discussions.

**Process:**

At the election of parties, either one arbitrator or a panel of three arbitrators presides at a hearing where parties present evidence through documents, other exhibits and testimony. Application of the rules of evidence is relaxed somewhat in order to save time and money.

The process includes important, trial-like sources of discipline and creates good opportunities to assess the impact and credibility of key witnesses:

- Parties may use subpoenas to compel witnesses to attend or present documents
- Witnesses testify under oath, through direct and cross-examination

- The proceedings can be transcribed and testimony could, in some circumstances, be used later at trial for impeachment.

Arbitrators apply the law to the facts of the case and issue a non-binding award on the merits. Arbitrators do not "split the difference" and do not conduct mediations or settlement negotiations.

#### **Preservation of right to trial:**

Either party may reject the non-binding award and request a trial de novo before the assigned judge, who will not know the content of the non-binding arbitration award. If no such demand is filed within the prescribed time, the award becomes the final judgment of the court and is not subject to appellate review. There is no penalty for demanding a trial de novo or for failing to obtain a judgment at trial that is more favorable than the arbitration award. Rejecting an arbitration award will not delay the trial date.

Parties may stipulate in advance to waive their right to seek a trial de novo and thereby commit themselves to be bound by the arbitration award.

#### **The neutral(s):**

Most courts impose minimum qualifications for court-connected arbitrators. For example, the Northern District of California requires the following:

- Admission to the practice of law for at least 10 years;
- For at least five years, spent a minimum of 50 percent of professional time litigating or had substantial experience as an ADR neutral; and
- Training by the court.

Court-connected non-binding arbitration programs also provide a fair process for selection of the arbitrators.

#### **Appropriate cases/circumstances:**

Cases with the following characteristics may be particularly appropriate for non-binding arbitration:

- Only monetary (and not injunctive) relief is sought
- The complaint alleges personal injury, property damage or breach of contract
- The amount in controversy is less than \$150,000
- The case turns on credibility of witnesses
- The case does not present complex or unusual legal issues

### **IV. Settlement Conferences**

Some lawyers and litigants assume that a judicially hosted "settlement conference" and a mediation hosted by a person who is not a judge are the same – but these two processes are sometimes quite different. Sometimes a judge who hosts a settlement conference will play essentially the same largely facilitative role that a mediator would play – but sometimes a settlement judge plays quite a different role. In some circumstances, a

settlement judge focuses more directly on analysis of law and evidence and more assertively assesses the strengths and weaknesses of the parties' positions. Sometimes settlement judges offer a prediction of outcome at trial and indicate what they think the settlement value (or range of values) of the case is. As a general rule, settlement judges are not likely to focus as much as a mediator would on interests or concerns of the parties that might underlie or be implicated by the case but that would not be relevant under the law to an adjudicated disposition. Sometimes settlement judges place less emphasis than mediators would on improving communication and understanding across party lines. And settlement judges may attend less than mediators would to the emotional dimensions of a dispute.

**Goal:**

The goal of a settlement conference is to facilitate parties' efforts to negotiate a settlement of all or part of the dispute.

**Process:**

A judicial officer, often a magistrate judge or bankruptcy judge, helps parties negotiate. Some settlement judges also use mediation techniques to improve communication among parties, explore barriers to settlement and assist in formulating resolutions. Settlement judges might articulate views about the merits of the case or the relative strengths and weaknesses of parties' legal positions. Often settlement judges meet with one side at a time, and some settlement judges rely primarily on meetings with counsel.

Settlement conferences may be structured in a variety of ways. Some settlement judges begin the process with a joint meeting in which each side makes a presentation to the other and responds to questions. Many settlement judges use private caucusing extensively, a process that features confidential meetings with one side at a time. Clients are required to attend most settlement conferences, but sometimes their participation is limited. For example, the settlement judge might limit the joint meeting to lawyers; thus, clients might not participate directly in all of the private caucuses with the judge.

**Preservation of right to trial:**

The settlement judge has no power to impose settlement and does not attempt to pressure a party to accept any proposed terms. If no settlement is reached, the case remains on the litigation track. The settlement judge does not disclose to the trial judge communications that occurred during the conference or the settlement judge's opinion about the merits of any party's position. Parties' formal discovery, disclosure and motion practice rights are fully preserved.

**The neutral:**

The judge who would preside at trial ordinarily does not conduct the settlement conference. In some districts, parties may request that a specific magistrate judge host their negotiations or rank several magistrate judges in order of preference.

Most magistrate judges have standing orders setting forth their requirements for settlement conferences, including written statements and attendance.

**Written submissions:**

The settlement judge may require written settlement conference statements. If so, they are submitted directly to the settlement judge and are not filed with the court. Some judges ask the parties to exchange their written statements, while other judges ask that each party submit its statement only to the settlement judge (*ex parte*).

**Appropriate cases/circumstances:**

Almost any case might benefit from a settlement conference. Cases with the following characteristics may be particularly appropriate:

- A client or attorney prefers to appear before a judicial officer
- Issues of procedural law are especially important
- A party is not represented by counsel
- A client or lawyer is especially interested in hearing a judge's views about the case
- It is especially important to minimize litigation costs. One or more of the parties does not want to or is not in a position to pay for the services of a neutral

## ***Guide to Court-Sponsored ADR Resource Persons***

### **Alaska**

<b>Judge(s)</b>	Honorable Herbert A. Ross, Sr. Bankruptcy Judge (on recall) U.S. Bankruptcy Court Historic Courthouse 605 West Fourth Ave, Suite 138 Anchorage, Alaska 99501-2296 (907) 271-271-2630
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### **Arizona**

<b>Judge(s)</b>	Honorable Frank R. Zapata District Judge (Member, Ninth Circuit ADR Committee) U.S. District Court, District of Arizona Evo A. Deconcini U.S. Courthouse 405 West Congress Street, Room 5113 Phoenix, Arizona 85067 (520) 205-4530
<b>ADR Administrators or Court Staff</b>	Richard H. Weare District Court Clerk U.S. District Court, District of Arizona Sandra Day O'Connor U.S. Courthouse 401 West Washington Street Phoenix, Arizona 85003 (602) 322-7101

### **California - Central**

<b>Judge(s)</b>	Honorable Dorothy W. Nelson Senior Circuit Judge (Chair, Ninth Circuit ADR Committee; Chair, Western Justice Center Foundation) U.S. Court of Appeals 125 South Grand Avenue, Suite 303 Pasadena, California 91105 (626) 229-7400
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<b>Judge(s)</b>	<p>Honorable Raymond C. Fisher Circuit Judge (Member, Ninth Circuit ADR Committee) U.S. Court of Appeals 125 South Grand Avenue, Suite 402 Pasadena, California 91105 (626) 229-7110</p> <p>Honorable Jeffrey Johnson Magistrate Judge (Member, Ninth Circuit ADR Committee) U.S. District Court, Central District of California U.S. Courthouse 312 North Spring Street, Room 831 Los Angeles, California 90012 (213) 894-5094</p> <p>Honorable Margaret M. Morrow District Judge U.S. District Court, Central District of California (Chair, Central District's ADR Committee) U.S. Courthouse 255 East Temple Street Los Angeles, California 90012 (213) 894-1565</p> <p>Honorable Judge Barry Russell Chief Bankruptcy Judge (Member, Ninth Circuit ADR Committee) U.S. Bankruptcy Court, Central District of California Edward Roybal Federal Building and Courthouse 255 East Temple Street, Room 1660 Los Angeles, California 90012 (213) 894-6091</p> <p>Susan M. Doherty Mediation Program Coordinator U.S. Bankruptcy Court, Central District of California Edward Roybal Federal Building and Courthouse 255 East Temple Street Los Angeles, California 90012 (213) 894-6093</p>
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<b>ADR Administrators or Court Staff</b>	<p>Lydia Yurtchuk  ADR Coordinator  U.S. District Court, Central District of California  312 North Spring Street, Suite G-8  Los Angeles, California 90012  (213) 894-8249</p>
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### **California - Eastern**

<b>Judge(s)</b>	<p>Honorable Gregory G. Hollows  Magistrate Judge  U.S. District Court, Central District of California  501 "I" Street, Suite 8-200  Sacramento, California 95814  (916) 930-4195</p> <p>Honorable Kimberly Mueller  Magistrate Judge  (Member, Ninth Circuit ADR Committee)  U.S. District Court, Central District of California  501 "I" Street, Suite 80230  Sacramento, California 95814  (916) 930-4022</p>
<b>ADR Administrators or Court Staff</b>	<p>Linda Martinez  Administrator for Voluntary Dispute Resolution Program  U.S. District Court, Central District of California  501 "I" Street, Suite 8-200  Sacramento, California 95814  (916) 930-4280</p>

### **California - Northern**

<b>Judge(s)</b>	<p>Honorable Wayne D. Brazil  Magistrate Judge  (Member, Ninth Circuit ADR Committee)  U.S. District Court, Northern District of California  Federal Building and U.S. Courthouse  1301 Clay Street, Suite 400 South  Oakland, California 944612  (510) 637-637-3324</p>
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	<p>Honorable Jeremy Fogel  District Judge  U.S. District Court, Northern District of California  280 South First Street, 5<sup>th</sup> Floor  San Jose, California 95113  (408) 535-5166</p>
	<p>Honorable Susan Illston  District Judge  U.S. District Court, Northern District of California  450 Golden Gate Avenue, 19<sup>th</sup> Floor  San Francisco, California 94102  (415) 522-2028</p> <p>Honorable Edward Infante  Magistrate Judge  U.S. District Court, Northern District of California  280 South First Street, 5<sup>th</sup> Floor  San Jose, California 95113  (408) 535-5377</p> <p>Honorable Randall J. Newsome  Chief Bankruptcy Judge  (Member, Ninth Circuit ADR Committee)  U.S. Bankruptcy Court, Northern District of California  1300 Clay Street, Suite 300  Oakland, California 94601  (510) 8973530</p> <p>Honorable Jon True III  Superior Court Judge  Superior Court of Alameda County  24405 Amador Street, Hayward Hall of Justice, 1<sup>st</sup> Floor  Hayward, California 94544  (510) 670-6321</p>
<b>ADR Administrators or Court Staff</b>	<p>Howard Herman, Esq.  Director, Alternative Dispute Resolution Program  U.S. District Court, Northern District of California  450 Golden Gate Avenue, 19<sup>th</sup> Floor  San Francisco, California 94102  (415) 522-2027</p>

	<p>Robin Siefkin, Esq.  Alternative Dispute Resolution Program  U.S. District Court, Northern District of California  450 Golden Gate Avenue, 19<sup>th</sup> Floor  San Francisco, California 94102  (415) 522-2199</p>
	<p>Sheila Purcell, Esq.  Appropriate Dispute Resolution Director  Multi-Option ADR Project  San Mateo County Courts  400 County Center  San Mateo, California 94063  (650) 363-4148</p> <p>John Toker, Esq.  Mediation Program Administrator  State of California Court of Appeal, First Appellate Dist.  350 McAllister Street  San Francisco, California 94102-3600  (415) 865-7375</p>

**California - Southern**

<b>Judge(s)</b>	<p>Honorable Louise De Carl Adler  Bankruptcy Judge  (Member, Ninth Circuit ADR Committee)  U.S. Bankruptcy Court, Southern District of California  325 West "F" Street  San Diego, California 92101</p>
<b>ADR Administrators or Court Staff</b>	<p>Honorable Louisa S. Porter  Magistrate Judge  U.S. District Court, Southern District of California  940 Front Street, Room 1140  San Diego, California 92101  (619) 557-6582</p>

## Guam

<b>ADR Administrators or Court Staff</b>	Mary Moran District Court Clerk U.S. District Court 4 <sup>th</sup> Floor, U.S. Courthouse 520 West Soledad Avenue Hagatna, GU 96910 (671) 473-9100
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## Hawaii

<b>Judge(s)</b>	<p>Honorable Barry M. Kurren Magistrate Judge U.S. District Court, District of Hawaii 300 Ala Moana Blvd., Rm. C-229 Honolulu, Hawaii 96813 (808) 541-1306</p> <p>Magistrate Judge Kevin S. C. Chang 300 Ala Moana Blvd., Rm. C-229 Honolulu, Hawaii 96813 (808) 541-1308</p> <p>Magistrate Leslie E. Kobayashi 300 Ala Moana Blvd., Rm. C-353 Honolulu, Hawaii 96813 (808) 541-1331</p>
<b>ADR Administrators or Court Staff</b>	<p>Sue Beitia District Court Clerk U.S. District Court, District of Hawaii 300 Ala Moana Boulevard, Room C-338 Honolulu, Hawaii 96813 (808) 541-1300</p> <p>Elizabeth Kent, Esq. Director Center for Alternative Dispute Resolution The Judiciary – State of Hawaii P.O. Box 2560 Honolulu, Hawaii 96804 (808) 539-4238</p>

**Idaho**

<b>ADR Administrators or Court Staff</b>	Denise M. Asper ADR Program Director (Member, Ninth Circuit ADR Committee) U.S. District Court, District of Idaho 550 West Fort Street Boise, Idaho 84724 (208) 334-9067
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**Montana**

<b>ADR Administrators or Court Staff</b>	Leandra Kelleher Chief Deputy Clerk Russel Smith courthouse P.O. Box 8537 Missoula, Montana 59807 (406) 542-7261
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**Nevada**

<b>Judge(s)</b>	<p>Honorable Valerie Cooke Magistrate Judge (Member, Ninth Circuit ADR Committee) U.S. District Court, District of Nevada 400 South Virginia Street Reno, Nevada 89501 (775) 868-5855</p> <p>Honorable Robert Johnston Magistrate Judge U.S. District Court, District of Nevada 333 Las Vegas Boulevard Las Vegas, Nevada 89101 (702) 464-5550</p> <p>Honorable Peggy Leen Magistrate Judge U.S. District Court, District of Nevada 400 South Virginia Street Las Vegas, Nevada 89501 (702) 464-5570</p>
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<b>ADR Administrators or Court Staff</b>	<p>Honorable Gregg Zive Chief Bankruptcy Judge (Former member, Ninth Circuit ADR Committee) U.S. District Court, District of Nevada 404 U.S. Courthouse 400 South Virginia Street Reno, Nevada 89501 (775) 784-5017</p> <p>Tom Harris, Esq. Director, Settlement Program Nevada Supreme Court Regional Justice Center 200 Lewis Avenue, 17th Floor Las Vegas, Nevada 89101</p>
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#### **Northern Mariana Islands**

<b>ADR Administrators or Court Staff</b>	<p>Galo L. Perez District Court Clerk P.O. Box 687 Saipan, CM 96950 (670) 236-2902</p>
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#### **Oregon**

<b>Judge(s)</b>	<p>Honorable Ann L. Aiken District Judge (Member, Ninth Circuit ADR Committee) U.S. District Court, District of Nevada 211 East Seventh Avenue, Room 286 Eugene, Oregon 97401 (541) 465-6409</p>
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**Washington - Eastern**

<b>Judge(s)</b>	<p>Honorable Robert H. Whaley Chief District Judge U.S. District Court, Eastern District of Washington P.O. Box 283 Spokane, Washington 99210 (509) 353-2170</p> <p>Honorable Lonny R. Suko District Judge United States District Court, Eastern District of Washington P.O. Box 2706 Yakima, Washington 98907 (509) 454-5635</p> <p>Honorable Cynthia Imbrogno Magistrate Judge U.S. District Court, Eastern District of Washington P.O. Box 263 Spokane, Washington 99210 (509) 353-0660</p> <p>Honorable Michael W. Leavitt Magistrate Judge U.S. District Court, Eastern District of Washington P.O. Box 128 Yakima, Washington 98907 (509) 575-5997</p>
<b>ADR Administrators or Court Staff</b>	<p>James R. Larsen District Executive and Clerk of the Court U.S. District Court, Eastern District of Washington P.O. Box 1493 Spokane, Washington 99210 (509) 353-2150</p> <p>Leslie Downey Chief Deputy Clerk U.S. District Court, Eastern District of Washington P.O. Box 1493 Spokane, Washington 99210 (509) 353-2150</p>

**Washington - Western**

<b>Judge(s)</b>	<p>Honorable Robert S. Lasnik Chief District Judge U.S. District Court, Western District of Washington 700 Stewart Street Seattle, Washington 98101 (206) 370-8810</p> <p>Honorable John C. Coughenour District Judge U.S. District Court, Western District of Washington 700 Stewart Street Seattle, Washington 98101 (206) 370-8800</p> <p>Honorable Monica J. Benton Magistrate Judge U.S. District Court, Western District of Washington 700 Stewart Street Seattle, Washington 98101 (206) 370-8900</p> <p>Honorable James P. Donohue Magistrate Judge U.S. District Court, Western District of Washington 700 Stewart Street Seattle, Washington 98101 (206) 370-8940</p> <p>Honorable Mary Alice Theiler Magistrate Judge U.S. District Court, Western District of Washington 700 Stewart Street Seattle, Washington 98101 (206) 370-8890</p>
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<b>ADR Administrators or Court Staff</b>	<p>Janet Bubnis Chief Deputy U.S. District Court, Western District of Washington 700 Steward Street Seattle, Washington 98104 (206) 370-8483</p> <p>J. Kirkham Johns Chair, ADR Committee – Federal Bar Association Western District of Washington [Administers Local CR 39.1 ADR Program] Stafford Frey Cooper 601 Union Street, Suite 3100 Seattle, Washington 98101-1374 206-667-8287</p>
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### **Ninth Circuit Court of Appeals**

<b>ADR Administrators or Court Staff</b>	<p>David Lombardi, Esq. Chief Circuit Mediator (Member, Ninth Circuit ADR Committee)\ U.S. Court of Appeals for the Ninth Circuit Circuit Mediation Office P.O. Box 102020 San Francisco, California 94119 (415) 556-9907</p>
<b>Mediators</b>	<p>Roxanne Ash, Esq. Claudia Bernard, Esq. Margaret Corrigan, Esq. Lisa Evans, Esq. Steven Iacora Ann Julius C. Lewis Ross, Esq. Peter Sherwood, Esq. U.S. Court of Appeals for the Ninth Circuit Circuit Mediation Office P.O. Box 102020 San Francisco, California 94119 (415) 556-9900</p>

	Chris Goelz, Esq. Circuit Mediator U.S. Court of Appeals for the Ninth Circuit 1200 6th Avenue, 3rd Floor Seattle, Washington 98101 (206) 553-6101
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### **Additional Information about or Assistance with Court-Connected ADR**

Robin Donoghue  
Assistant Circuit Executive for Legal Affairs  
U.S. Court of Appeals for the Ninth Circuit  
Office of the Circuit Executive  
95 Seventh Street, Suite 429  
San Francisco, California 94103-1526  
(415) 556-9588

Court ADR Program Assistance (CAPA)  
The American Bar Association  
Section of Dispute Resolution  
740 Fifteenth St, NW  
Washington DC, 20005-1009  
[www.abanet.org/dispute/California](http://www.abanet.org/dispute/California) pa

Donna Stienstra  
Senior Researcher  
Court ADR Program Assistance  
Federal Judicial Center  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle NE  
Washington, D.C. 20002-8003  
(202) 502-4000

### ***Ninth Circuit ADR Program Evaluation Form***

Title of Conference/Meeting: \_\_\_\_\_

Title of Program: \_\_\_\_\_

Date of Program: \_\_\_\_\_

What did you think about the ADR program? Your suggestions are important to the Ninth Circuit ADR Committee for future program development. Please return this form to the registration desk or leave it on your chair. Thank you!

Rating Method on a scale of 1 to 5				
Poor/Least Useful		Fair		Excellent/Most Useful
1	2	3	4	5

I am a                    ☐ Circuit Judge   ☐ District Judge   ☐ Bankruptcy Judge   ☐ Magistrate Judge  
                             ☐ Lawyer           ☐ Court Staff     ☐ Other (please explain) \_\_\_\_\_

1. Please rate the value and effectiveness of the topic:            1            2            3            4            5

Comments: \_\_\_\_\_

2. The quality of the presenters' preparation:                            1            2            3            4            5

3. The length of the session was:    1            2            3            4            5

4. What I LIKED MOST about the program was: \_\_\_\_\_

\_\_\_\_\_

5. What I LIKED LEAST about the program was: \_\_\_\_\_

\_\_\_\_\_

6. The presenter(s) could have SPENT MORE TIME on: \_\_\_\_\_

\_\_\_\_\_

7. The presenter(s) could have SPENT LESS TIME on: \_\_\_\_\_

\_\_\_\_\_

8. What topics related to court-sponsored ADR would you like to see addressed in future programs?

\_\_\_\_\_

\_\_\_\_\_

*Please use the other side if you have more comments.*  
**Please leave at your seat or turn in at the program registration desk. Thanks!**